Supreme Court, U.S.
FILED

00-207 AUG - 7 2000

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Sylvia J. Wasson, an Individual,
Petitioner,

v.

Sonoma County Junior College District; Governing Board of the Sonoma County Junior College District; Robert F. Agrella; James Mitchell; John Roberts,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A.

Does an individual have standing to assert an anonymous speech claim on behalf of herself and other third parties while still preserving her anonymity, or that of another, or must this person identify herself or another as the author in order to be protected under the First Amendment?

B.

Does a public employee have standing to assert a First Amendment anonymous speech claim when her employer chills her First Amendment free speech rights in its effort to suppress the protected speech of another and does the First Amendment prohibit the employer from punishing this employee based upon another person's protected speech?

PARTIES TO THE PROCEEDING

Petitioner

Sylvia J. Wasson, Ed.D., is the Petitioner to this Court. Petitioner is an individual with no corporate affiliations.

Respondents

The captioned Respondents in this Petition for Writ of Certiorari from the Judgment of the United States Court of Appeals for the Ninth Circuit are the Sonoma County (California) Junior College District, The Governing Board of the Sonoma County Junior College, Robert F. Agrella, James Mitchell and John Roberts. The actual Respondents, however, were Robert F. Agrella and John Roberts.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 203 F.3d 659 (9th Cir. 2000). A copy of this opinion is included in Appendix A at 1a-9a.[1] A previous Opinion by the United States District Court for the Northern District of California (Orrick, J.) ("District Court"), pertinent to this case is included in Appendix C at 12a-47a.[2] The District Court's April 22, 1998 Judgment, granting a Motion to Dismiss and/or Stay the Federal Proceedings, brought by Respondents Robert F. Agrella and John Roberts is included as Appendix B at 10a-11a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion on February 16, 2000. (*See* App. A at 1a). On March 8, 2000, the Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which the Court denied on May 8, 2000. *See* App. D at 48a-49a. This Petition for Writ of Certiorari is filed within 90 days of the

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[1] Citations to "App." are to the Appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

[2] The Petitioner's appeal to the United States Court of Appeal for the Ninth Circuit challenged the District Court's April 22, 1998 Judgment, attached hereto as Appendix B at 10a-11a. This judgment dismissed the Petitioner's claims against Respondents Agrella and Roberts in their individual capacities. An earlier District Court Opinion and Order dismissing the Petitioner's claims against Respondent Sonoma County Junior College District and Respondent Sonoma County Junior College District Governing Board as well as all claims against Respondents Robert Agrella and John Roberts, in their official capacities, is attached hereto as Appendix C. This Opinion and Order is included to appropriately reference the Court's reasoning concerning certain issues relevant to the issues herein.

denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of The United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The facts of this case are undisputed. The Petitioner, Sylvia J. Wasson, Ed.D. ("Dr. Wasson"), is a 24-year employee of the Sonoma County (California) Junior College District ("District").

The six anonymous documents around which this case revolves were authored and disseminated between August 1995 and October 1996 and addressed matters of legitimate public concern. *See* App. C at 27a. They criticized District President Robert F. Agrella ("Agrella") and his administration, questioned his moral integrity, professional qualifications and management style. They also criticized the District's waste of taxpayers' money, documented Agrella's abuses of the legal system, questioned free speech rights in the District and the civil and employment rights of District employees. Finally, these documents criticized the Sonoma County Junior College District Governing Board ("Governing Board") for their lack of oversight of Agrella's administration.

In the Spring of 1996, the Respondents initiated an investigation to find the author[s] of these documents after Agrella advised the Governing Board of his conclusion that the author[s] were District employees. Agrella based this conclusion solely upon his belief that the anonymous author was someone harboring animosity toward him, which he surmised stemmed from a prior employment or legal dispute with the District. The Governing Board commenced its investigation to identify the author[s] and disseminator[s] of the anonymous documents on the pretextual basis that the documents had defamed Agrella and had harmed the college. The Governing Board also claimed that the author[s]' anonymity "caused grave doubt" as to the author[s'] moral fitness and evidenced "a lack of emotional stability so severe as to call into doubt the author's fitness to continue as an

employee of [the Santa Rosa (California) Junior College]." They proceeded from these unsubstantiated assumptions and hired a handwriting analyst without properly investigating her competency or prior false identifications made by her.

During this investigation, Agrella directed James Mitchell, the Personnel Director, to obtain materials from Dr. Wasson's personnel files because he suspected her of being the author. These materials were delivered to the handwriting examiner who incorrectly concluded that the handwriting on one envelope and the prose style of the anonymous letters belonged to Dr. Wasson. Agrella subsequently ordered the District Police Chief to search all computer printers, typewriters and photocopiers available to Dr. Wasson. This entailed a search of 49 separate office machines at 13 different locations, in which 11 documents containing personal information were retrieved, but no conclusive results were produced.

On January 14, 1997, acting upon the recommendation of Agrella's designee (and signed under the penalty of perjury), John Roberts ("Roberts"), the Governing Board terminated Dr. Wasson on the basis of "evident unfitness for service" under California Education Code §87732(d). This decision was based entirely on the allegation that she had authored the six anonymous documents, which the Respondents claimed contained "false and defamatory statements," whose dissemination had "caused disruption of the orderly administration of the community college and [would] negatively impact the education offered by the District."

After being summarily removed from the classroom, Dr. Wasson filed a complaint in the Sonoma County (California) Superior Court, seeking injunctive relief. A temporary restraining order was granted with the condition that Dr. Wasson be placed on paid administrative leave pending a

hearing on the merits of issuing a preliminary injunction. On March 24, 1997, the Governing Board withdrew its charges against Dr. Wasson, without prejudice, allowing her to resume her teaching duties.[3] Pursuant to California Education Code §§ 87675 and 87680, however, these charges can be reinstated at anytime until October 28, 2000.

The Governing Board retained Michael O'Donnell, a local attorney, to review the dismissal of Dr. Wasson. His report entitled "Report on Investigation Into Issues Surrounding Dismissal Proceedings (Now Withdrawn) Against Dr. Sylvia Wasson" ("The O'Donnell Report") was released on April 11, 1997, nineteen days after Dr. Wasson's reinstatement. The Governing Board knowingly waived the attorney-client privilege and released The O'Donnell Report, which was widely republished by a local newspaper. It was also placed in the District's libraries and was released by the District and/or its agents to the *Chronicle of Higher Education*, a preeminent national publication, which published a story concerning Dr. Wasson on June 6, 1997.

The O'Donnell Report accused Dr. Wasson directly and by innuendo of carrying out a campaign of harassment against Agrella, inclusive of the criminal acts of harassing telephone messages, electronic eavesdropping, vandalism and forgery. In addition, Dr. Wasson was also accused of being the author of the six anonymous documents and, as such, being of unfit moral character, suffering a severe lack of emotional stability, and being unfit to continue as a District employee.

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[3] The District Court observed that the Respondents' act of removing Dr. Wasson from the classroom and placing her on administrative leave for approximately three months caused an "injury in fact" to her free speech rights. *See* App. C at 28a.

Dr. Wasson filed a Complaint in the District Court on July 28, 1997, and the Respondents filed a Motion to Dismiss which was heard on October 30, 1997. The Respondents' motion was granted in part and denied in part by an Order and Opinion dated December 5, 1997. *See* App. C at 12a-47a. In this Order, all claims against the District, the Governing Board and Agrella and Roberts, in their official capacities, were dismissed, as barred by the Eleventh Amendment. *Id.* at 44a.

On December 24, 1997, Dr. Wasson filed a First Amended Complaint in District Court against Agrella and Roberts in their individual capacities. The Respondents filed a second Motion to Dismiss and/or Stay the Federal Proceedings. On April 22, 1998, the District Court dismissed Dr. Wasson's Complaint, holding that Agrella and Roberts, *inter alia*, were entitled to qualified immunity. (*See* App. B at 10a-11a). Dr. Wasson appealed this decision to the United States Court of Appeals for the Ninth Circuit and on February 16, 2000, the District Court's decision was affirmed on different grounds. The Court held that Dr. Wasson's denial of engaging in any protected speech activity undermined her free speech claim because it acted as an acknowledgement that no protected speech activity had occurred. *See Wasson v. Sonoma County Junior College, et al.* 203 F.3d 659, 662 (9th Cir. 2000) (*See* App. A at 5a-6a). Furthermore, the Court reasoned that since no protected speech activity had occurred, the "reasonable manager" standard, set forth in *Waters v. Churchill,* 511 U.S. 661, 678, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) was not applicable. *See Wasson,* 203 F.3d 659 at 663 (*See* App. A at 7a). Thus, the Court affirmed, on different grounds, the District Court's judgment, granting the Respondents' Motion to Dismiss and/or Stay Federal Proceedings. Dr. Wasson filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* with the United States Court of Appeals for the Ninth Circuit on March 8, 2000, but

this Petition was denied by the Court on May 8, 2000. *See* App. D at 48a-49a.

ARGUMENT FOR GRANTING WRIT

This Court is requested to define the extent of protection for anonymous speech rights in the public employment sector. Dr. Wasson presents this Court with fundamental questions surrounding this issue. For instance, can courts compel a person to waive her anonymity or identify an anonymous author as a prerequisite for establishing standing to assert an anonymous speech claim? Additionally, can a public community college permissibly punish Dr. Wasson, as its employee, based upon the protected speech of an anonymous author?

The Ninth Circuit Court held that Dr. Wasson lacked personal and/or third party standing to assert her anonymous speech claim because she denied authoring the six anonymous documents and because her denial evidenced no protected speech having occurred. Dr. Wasson had to deny authoring these documents or stating her association with the actual anonymous author to preserve her anonymous speech right. It is counterintuitive to protect anonymous speech, but undermine this right by requiring an anonymous author reveal her identity or association with another in order to vindicate infringement of this right. Yet, this is the precedence that the Ninth Circuit Court created. Courts cannot impose such a requirement because it constitutes government coercion to waive a constitutional right as well as an impermissible disclosure requirement. The Ninth Circuit Court's standing requirement for anonymous speech cases is also disturbing because it stands for the principle that individuals, such as Dr. Wasson, suffering violations to their anonymous speech rights and who are unwilling to waive this right, cannot vindicate it. Therefore, such people must tolerate the chilling of their free speech rights

by a public entity even when the actions against them are due to the protected speech of another person.

Anonymous authors choose to write anonymously, whether on matters of public concern or whether drafting literature to be enjoyed by a reading audience, to provide more emphasis on what is being said and not upon who is saying it. This decision may also be made to avoid reprisal by a vindictive employer or ostracism by the author's peers. Regardless of why a person chooses to write anonymously, the First Amendment clearly protects this form of writing. *Wasson* now requires public employees who choose to write anonymously to waive this right in order to redress violations of it. Why will authors otherwise relying upon the cloak of anonymity to publicly speak do so when they must later reveal their identity when this right has been violated? With the exception of the most dedicated or fervent anonymous authors, most people choosing to write anonymously will decide that it is better not to speak at all than to have to reveal one's identity at a later time. This Court must not allow anonymous speech to be chilled in this manner.

Wasson v. Sonoma County Junior College, et al. also instructs public employers that they can escape liability when willfully or maliciously violating their employees' anonymous speech rights if an employee, such as Dr. Wasson, is unwilling to waive this right.

Wasson v. Sonoma County Junior College, et al. also undermines and/or disregards the precedence from Supreme Court cases including, but not limited to, *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), *Talley v. California,* 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) and *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 890 S.Ct. 733, 21 L.Ed.2d 731 (1969). Similarly, *Wasson* is contradictory to the

Ninth Circuit Court's decision in *Rosen v. Port of Portland,* 641 F.2d 1243 (9th Cir. 1981). Therefore, the need for guidance from this Court on the issue of anonymous speech rights is imperative.

ARGUMENT A

It Is Counterintuitive To Require The Protection of Anonymous Speech Rights Be Contingent Upon The Waiver Of This Right.

The Ninth Circuit Court held that Dr. Wasson had not engaged in protected speech due to her unwillingness to waive her anonymous speech rights by confessing that she authored the six anonymous documents or was associated with the actual anonymous author. *Wasson,* 203 F.3d 659 at 662. Following this reasoning, Dr. Wasson *could* assert this claim if such a confession or identification occurred.

This reasoning relies on the traditional analysis for determining standing to assert a claim. Generally, standing is established when a plaintiff shows an "injury in fact," a causal connection between the injury and the defendant's conduct, and a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). This injury has to be individualized and may not be an "abstract question of wide public significance amounting to only a generalized grievance." *Valley Forge Christian College v. Americans United For Separation of Church and State,* 454 U.S. 464, 474-475, 102 S.Ct. 752, 759-760, 70 L.Ed.2d 700 (1982). The Ninth Circuit Court found that anonymous protected speech was involved in this case, but since Dr. Wasson denied being the anonymous author, she had not suffered an "injury in fact" to this right, despite being terminated, removed from the classroom and forced to take

administrative leave for three months by the Respondents. (*See* App. A at 6a). Thus, her admission to authoring these documents, or declaring her involvement with their publication was a determinative factor in the Court's analysis of whether a causal connection existed between the Respondents' acts and Dr. Wasson's injury to her anonymous speech right. Consequently, since Dr. Wasson denied authoring the six anonymous documents, she lacked standing to assert her free speech claim because there was no "injury in fact."

In *McIntyre v. Ohio Elections Comm'n.*, this Court observed that it is solely an author's decision whether to write anonymously. *McIntyre,* 514 U.S. 334 at 341-342. This right is an aspect of freedom of speech protected by the First Amendment. *Id.* Once behind the cloak of anonymity, the First Amendment protects the author from compelled disclosure. The Ninth Circuit Court's application of the traditional analysis for determining standing, stated above, cannot be used in context of anonymous speech cases because it is contrary to the *McIntyre* Court's intended protection for anonymous authors. This analysis makes the ability to assert anonymous speech claims, such as Dr. Wasson's claim, contingent on the waiver of one's right to anonymity by either revealing her identity by confessing authorship or her association with the anonymous author to show that an "injury in fact" has occurred.

In *Talley v. California, supra,* this Court observed numerous instances throughout history where authors relied upon the cloak of anonymity to publicly express their views and/or opinions. *Talley,* 362 U.S. 60 at 64-65. This Court recognized the importance of this form of writing by protecting it in order to facilitate and encourage anonymous speech when authors are faced intimidation or threats of reprisal. This protection assured anonymous authors that they could publicly express their views and/or opinions without being punished for

doing so. *See Talley v. California, supra* and *McIntyre v. Ohio Elections Comm'n., supra*. The Ninth Circuit Court now holds that this right cannot be protected, and *even will not exist*, until an anonymous author reveals her identity by confessing that she wrote anonymously or was associated with the anonymous author. *Wasson,* 203 F.3d 659 at 662 (*See* App. A at 5a-6a).

The *Talley* majority observed that authors speak anonymously to avoid persecution for publicly expressing their views. *Talley*, 362 U.S. 60 at 64-65. Reason dictates that this fear is not eliminated when an anonymous author asserts a claim after this right has been violated. Instead, the author still relies on her anonymity to protect her from reprisal while vindicating this right. The consequence of the *Wasson* Court's holding is clear. Anonymous speech in the public employment sector will be chilled when such authors realize that this right is only protected for those who are willing to disclose their identities or otherwise identify another with whom the person being punished is associated.

The Ninth Circuit Court also allows public employers to escape liability when violating their employees' anonymous speech rights. In accordance with the Ninth Circuit Court's reasoning, the Respondents could have terminated without recourse not just Dr. Wasson, but also the other District employees targeted by the Respondents' investigation until someone "confessed" to being the author, thereby, according to the *Wasson* Court, invoking their constitutional protection for anonymous speech. For the Ninth Circuit Court, none of the employees, except the acknowledged author, would have any constitutional protection against such punishment. The preservation of anonymous speech rights cannot demand such a high price and courts cannot bestow such abusive power upon state employers.

The Ninth Circuit Court's analysis for granting standing in anonymous speech cases is nothing short of government coercion to waive this First Amendment right. This Court has previously held that official pressure to work for a political candidate not of an employee's own choice constitutes an impermissible form of government coercion of belief and violates fundamental constitutional rights. *Connick v. Meyers,* 461 U.S. 138, 148, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1983) (citations omitted). Applying this reasoning in the context of determining standing to assert anonymous speech claims, government coercion also exists when individuals are required to waive their right to anonymity or disclose their association with the actual author as a prerequisite for granting standing to assert a claim. As mentioned, such an obligation is counterintuitive to the preservation of this right and is an impermissible disclosure requirement imposed by the government. *See Talley v. California,* 362 U.S. 60 at 64 (holding that identification requirements tend to restrict the freedom to distribute information and, thereby, freedom of expression and violates the First Amendment because the fear of identification and reprisal might deter perfectly peaceful discussions of public matters of importance), *NAACP v. Alabama,* 357 U.S. 449, 459, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958) and *Rosen v. Port of Portland,* 641 F.2d 1243, 1250-1252 (9th Cir. 1981). Therefore, the Ninth Circuit Court erred and undermined its own precedence, as well as that from this Court, by reasoning that standing to assert an anonymous speech claim or even the determination of whether speech activity occurred is contingent upon Dr. Wasson's waiver of her First Amendment anonymous speech right.

Laird v. Tatum, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), offers a different analysis for determining whether standing exists to assert an anonymous speech claim. In *Laird,* this Court held: "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective

harm or a threat of future harm." *Id.* at 14. The *Laird* Court's test for standing can be applied without requiring an author to waive her anonymity or identify another as an anonymous author since this analysis focuses on whether the defendant's acts violated the plaintiff's First Amendment rights, not upon who committed these acts. This is opposed to the general standing test which requires a causal connection between the defendant's acts and the plaintiff's injuries, which, as mentioned, requires an anonymous author to reveal herself or another, thereby waiving her anonymous speech right or that of the actual author in order to demonstrate the required cause and effect relationship. Dr Wasson clearly demonstrated that she had standing to assert her anonymous speech claim, in that her right to engage in anonymous speech was objectively chilled by the Respondents' investigation and retaliatory acts against her. She suffered an actual injury as a result of the Respondents' conduct and is not merely asking an abstract question of wide public significance or making a generalized grievance. *Laird v. Tatum,* 408 U.S. 1 at 13.

Respondents' investigation singled out a discrete group of three District employees, inclusive of Dr. Wasson, suspected of authoring the anonymous documents. These employees were targeted based only upon their prior legal claims or disputes with Respondents. A handwriting analyst was hired to scrutinize the nuances of their penmanship and writing styles in confidential documents taken from these employees' personnel files. The District Chief of Police was ordered to search 49 separate office machines at 13 different locations. This search retrieved 11 documents containing personal information, yet, no conclusive results were found. The Respondents suspended their investigation consciously hoping that the anonymous letters would cease, but when more were published, they resumed it, intending to accomplish their sole objective of silencing the anonymous speech. The Respondents' private investigator harassed Dr. Wasson at her

home, she was removed from the classroom and charged with "evident unfitness for service," under California Education Code § 87732(d) and terminated based upon these charges. Dr. Wasson was not allowed to resume her teaching duties until approximately three months later, after the Respondents dismissed their charges against her without prejudice. Dr. Wasson continues to suffer injury to her free speech rights since California Education Code §§ 87675 and 87680 allows the Respondents to refile these charges at anytime until October 28, 2000. The Ninth Circuit Court was presented with these egregious facts, but disregarded them because Dr. Wasson refused to waive her anonymity and, therefore, her anonymous speech right as a prerequisite to establishing standing to assert her claim. This Court must now correct the damage the Ninth Circuit Court has caused to First Amendment anonymous speech rights.

Alternatively, the Ninth Circuit Court should have held that Dr. Wasson had third party standing to assert her free speech claim. Third party standing is established when: (1) the litigant suffers an "injury in fact;" (2) the litigant has a close relation to the third party; and (3) the third party's ability to protect his/her own interests is hindered. *Wasson, supra,* 203 F.3d 659 at 663; *citing Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (*See* App. A at 6a-7a). The third parties for whom Dr. Wasson's claims were asserted were her fellow District employees whose anonymous speech rights were chilled by the Respondents' investigation and subsequent retaliatory actions against Dr. Wasson and, in particular, the other two District employees also targeted by the Respondents' investigation. Dr. Wasson has previously demonstrated that the first prong of this analysis is satisfied, because she suffered an "injury in fact" to her anonymous speech rights in that she was terminated based upon the protected anonymous speech of another person.

In *Singleton v. Wulff,* 428 U.S. 106, 114-115, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), this Court explained that a "close relationship," is established when the litigant demonstrates a relationship to the parties whose rights she seeks to assert, such that the third party's enjoyment of this right is inextricably bound up with the activity the litigant wishes to pursue. Dr. Wasson's fellow employees, and, in particular, the other two District employees in the discrete group targeted by the Respondents' investigation, enjoy the right to freedom from being drawn into another such investigation. Dr. Wasson's attempt, by way of her cause of action, to deter and/or prevent any such future investigations and to redress the violations to the constitutional rights held by these third parties establishes a close identity of interests among this group.

Dr. Wasson has third party standing when the ability of these third parties to protect their own rights is hindered. *Wasson,* 203 F.3d 659 at 663 (*See* App. A at 7a). Both the other targeted teachers and those members of the college community drawn into the Respondents' investigation are impeded from attempting to assert their right to deter and/or prevent future unconstitutional investigations. This ability is impeded because the previous investigation was instigated and supervised by the administrator (Agrella) who signs their paycheck, reviews tenure and whose recommendation means everything to them.

The Ninth Circuit Court's reasoning undermines the validity of other case precedence from this Court in the areas of investigating and regulating constitutionally protected activities by state actors. In *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 544-545 83 S.Ct. 889, 9 L.Ed.2d 929 (1963) this Court addressed the question of whether a state investigative committee, investigating the infiltration of Communists into various organizations, could demand that the National Association for the Advancement of

Colored People disclose its membership roster to them. While the *Gibson* Court recognized that states have broad power to invesigate activities which affect their legitimate interests, it held that this power is not absolute. *Id.* at 545. Justice Douglas elaborated on the limitation of this government power by stating that no constitutional privilege exists for governmental entities to investigate matters they are otherwise prohibited from regulating. *Id.* at 561-562 (Douglas J. concurring).

Pursuant to the *Gibson* Court reasoning, even though states have broad investigatory powers, they are prohibited from engaging in unjustified or unwarranted intrusions into the exercise of First Amendment rights. *Id.* at 545, 558. In this case, Respondents operate a public community college and are clearly state actors. Pursuant to *Gibson*, they simply had no constitutional basis to justify their investigation, designed to identify and punish an individual engaging in constitutionally protected speech. It is well settled that when a public employee speaks on matters of public concern, a public employer's ability to regulate such conduct involves a balancing test to determine whether the employee's right in engaging in such speech outweighs the public employer's interest in promoting the efficiency of the public services it performs. *See Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968) and *Connick v. Meyers, supra* at 146. The Respondents asserted that their investigation was ordered due to the detrimental effect that the anonymous writings *would* have on the District, the harm that the District *would* suffer from the defamation of its chief administrator and the strife, dissent, unrest and uncertainty that *would* be promoted among students and faculty as a result of these six anonymous documents. Yet, they had no tangible evidence or rational indications that any detriment had occurred sufficient to justify investigating, regulating or punishing this anonymous speech activity. In fact, none of the Respondents' expressed concerns ever came to pass.

This Court previously addressed the issue of whether school officials may impair the First Amendment right to freedom of expression in order to prevent events which they fear will happen, but have not yet occurred. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the First Amendment right to freedom of expression was at issue and involved the rights of schoolchildren to wear armbands to school to protest the Vietnam War. In *Tinker*, school officials learned of a local group's plan to protest the Vietnam War by publicly wearing black armbands. *Id.* at 504. They responded by enacting a policy whereby students wearing such armbands would be asked to remove them. If the student refused, he or she would be suspended. *Id.* The Court observed that the school officials presented no evidence showing that the students' actions interfered with either the operation of the school or other students' rights. *Id.* at 508. Consequently, the Court reversed the district court's holding that the school officials' fear of disturbance caused by the students' wearing of the armbands was a sufficient basis to regulate this conduct. *Id.* Justice Fortas, writing for the majority, reasoned that students and *faculty* do not shed their First Amendment rights at the schoolhouse gate. *Id.* at 506 (emphasis added). Thus, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. He explained the extent of protection that is necessary to avoid chilling free speech:

> . . . [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another

> person may start an argument or cause a disturbance. But our Constitution says we must take this risk (citation omitted) and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive . . . society. *Id.* at 508-509.

Twenty six years after *Tinker,* the fears which caused school officials from the Des Moines Independent Community School District to prematurely act emerged in the Respondents and caused them to initiate their investigation into finding the anonymous author(s) in order to suppress speech. Like the actions of the school officials in *Tinker,* the Respondents' investigation infringed upon Dr. Wasson's freedom of expression. Even though Dr. Wasson has denied authoring the anonymous documents, the effect of the Respondents' actions against her has chilled her free speech rights, inclusive of her anonymous speech right. Respondents terminated Dr. Wasson based upon their unfounded conclusion that she had engaged in the protected speech. They subsequently withdrew their charge of "evident unfitness for service" (California Education Code § 87732(d)), without prejudice, but California Education Code §§ 87675 and 87680 allows the Respondents, until October 28, 2000, to reinitiate this charge against her. This capability chills Dr. Wasson's ability to engage in *any* form of protected speech.

The Respondents' reasons for their investigation, which, like those asserted by the school officials in *Tinker,* indicate that their actions were based upon fears of what *could* happen, not upon what *would* or what *did* happen if the exercise of anonymous speech rights were not suppressed.

Like to the holding in *Tinker,* the Respondents' suppression of Dr. Wasson's anonymous speech right was unconstitutional.

Moreover, Respondents' well publicized actions taken against Dr. Wasson have more than chilled the freedoms of speech and association held by the District's other employees. These actions, including the investigation, termination and public vilification and humiliation of Dr. Wasson, as well as removing her from the classroom, all at the government's initiation and expense, sent the clear and unmistakable message to the District's employees that criticism of the president, administration and/or governing board will not be tolerated. Rather than merely chill these freedoms, Respondents' conduct has effectively put them in the deep freeze. Even more so now that the Ninth Circuit Court has given its imprimatur. While freedoms of speech and association must be vigilantly protected throughout our society, nowhere are these rights more important than on the campuses of our public colleges.

Wasson v. Sonoma County Junior College, et al. undermines *Gibson* and *Tinker* by permitting public employers to investigate and/or regulate free speech in the public sector despite having an unconstitutional basis for doing so. The Court handed state employers tremendous power over their employees, permitting them to willfully violate employees' free speech right to remain anonymous until a single employee or group of employees can no longer tolerate such violations and is coerced into waiving this right in order to protect it. In this case, Dr. Wasson remains unwilling to waive her free speech right to deny authorship of the anonymous documents and argues that the Respondents' flagrant violations to her anonymous speech rights gives her standing to assert her free speech claim and those of her fellow employees.

The Ninth Circuit Court relied upon cases outside of the Ninth Circuit to support its holding that since Dr. Wasson

denied engaging in any constitutionally protected speech, there is no relevant speech to protect. *See Wasson,* 203 F.3d 659 at 662; *citing Jones v. Collins*, 132 F.3d 1048 (5th Cir. 1998), *Fogarty v. Boles*, 121 F.3d 886 (3rd Cir. 1997) and *Barkoo v. Melby*, 901 F.2d 613 (7th Cir. 1990) (*See* App. A at 5a-6a). In these cases, however, there was much more than a plaintiff's denial of having uttered protected speech; *there was no objectively manifested speech at all.* While the teacher in *Jones* denied accusations of leaking confidential information to parents, there was no evidence of *any* communication with the parents (by the teacher or anyone else). Similarly, in *Fogarty,* the plaintiff denied accusations of contacting a newspaper reporter and there was no evidence that *anyone* had talked to this reporter. Finally, in *Barkoo,* while the village employee denied instigating certain newspaper articles, she also denied that *anyone else* had instigated them. The common trait shared by *Jones, Fogarty* and *Barkoo* is that there was no constitutionally protected manifested speech and, as such, no speech to protect (anonymous or not).

Jones, Fogarty and *Barkoo* are clearly distinguishable from the facts of this case. The six anonymous documents *are comprised of constitutionally protected and objectively manifested anonymous speech* since they discuss matters of legitimate public concern. *See* App. B at 25a. The Ninth Circuit Court erroneously overlooked the fact that Dr. Wasson was protecting her anonymous speech rights, as well as those held by other District employees subjected to the Respondents' investigation and threatened punishment. The Respondents singled Dr. Wasson out from the discrete group of District employees suspected of authoring the anonymous documents and terminated her based upon these suspicions. Contrary to the Ninth Circuit Court's reasoning, whether Dr. Wasson would admit to authoring these documents or confess her involvement with their dissemination is *not* the determinative issue for pleading her First Amendment claim. *See Wasson,*

203 F.3d 659 at 662 (*See* App. A at 5a-6a). Rather, the issues are whether Dr. Wasson's First Amendment anonymous speech right was objectively chilled by the Respondents' impermissible actions and whether this right extends into the time when a litigant, such as her, asserts a claim to protect it. For the reasons previously mentioned, Dr. Wasson answers both questions in the affirmative.

The Ninth Circuit Court also misapplied *Waters v. Churchill,* 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994), consequently, undermining the precedence of this case. (*See* App. A at 7a). The Court improperly assumed that since Dr. Wasson denied authoring the anonymous documents, her claim for violation of her anonymous speech rights must arise from the manner which the Respondents treated her after accusing her of being the anonymous author. Thus, the Court reasoned, that "[First Amendment claims] cannot be used to remedy a case of mistaken identity" and "there can be no First Amendment claim when an employee is falsely accused of making statements uttered by someone else." *Wasson,* 203 F.3d 659 at 663. (*See* App. A at 6a). Guided by this erroneous reasoning, the Court concluded that *Waters v. Churchill* was distinguishable because "[*Waters*] concerned a mistake about the content of the plaintiff's speech, not about the identity of the speaker." *Id.* (*See* App. A at 7a).

The Ninth Circuit Court committed its first error by mischaracterizing the nature of Dr. Wasson's anonymous speech claim. Her claim was not based solely upon being falsely accused of being the anonymous author. Rather, it was asserted to protect the First Amendment anonymous speech rights held by other District employees and herself. The Court also erred due to the aforementioned mischaracterization of Dr. Wasson's anonymous speech claim. Since the Court incorrectly assumed that this claim was based upon a case of

mistaken identity, it held that *Waters v. Churchill* was not applicable in such cases.

The Court correctly observed that *Waters* held that an employer failing to conduct a reasonable investigation may not escape liability for mistakenly retaliating against an employee who engaged in protected speech. *Wasson,* 203 F.3d 659 at 663; *citing Waters,* 511 U.S. 661 at 677-678 (*See* App. A at 7a). The standard of care that must be exercised when protected speech may be involved is known as the "reasonable manager" standard and is the degree of care a reasonable manager would use before making an employment decision. *Waters,* 511 U.S. 661 at 678.

The Ninth Circuit Court distinguished *Waters* from this case on its facts and held that *Waters* does not apply in cases where an employee denies having spoken at all. *See Wasson,* 203 F.3d 659 at 663 (*See* App. A at 7a). A treatment of *Waters*, making it distinguishable based upon factual variances is inconsistent with the majority's reasoning in that case. In *Waters,* Justice Scalia, like the Ninth Circuit Court, argued for a limited application of the principle that government actors may violate the First Amendment even when believing that an employee's speech was unprotected. He argued that this principle should be limited to "licensing schemes and to deprivation[s] of the freedom of speech specifically through the judicial process." *Waters*, 511 U.S. 661 at 687 (Scalia, J. concurring). The majority rejected this argument reasoning that a broad application of the aforementioned principle is necessary because speech can be chilled in a variety of contexts. *Id.* at 669. When announcing the "reasonable manager" standard, the majority again emphasized its intent to broadly apply *Waters v Churchill* to protect First Amendment rights by agreeing with Justice Scalia that a standard of care, such as the "reasonable manager" standard, is typically not required under the constitution unless a protected property

interest is involved. *Id.* at 678, 688 (Scalia, J. concurring). Nevertheless, the threat of inadvertent punishment based upon the exercise of individual First Amendment rights made the broad application of the "reasonable manager" standard necessary. *Id.* at 678.

It is undisputed that anonymous speech activity was involved because the six documents in this case do not identify an author or were signed by such unidentifiable parties as "Eight Concerned Members of This College Community," "Concerned Faculty and Administrators at Santa Rosa Junior College," "Faculty, Administrators and Staff for Freedom and Justice at SRJC." The Respondents, consequently, had reason to believe that since anonymous speech was involved, First Amendment rights may also be implicated. Even if they lacked this awareness, they could have been so informed through the advice of counsel as well as becoming informed at this early date about conducting an investigation that would not infringe upon First Amendment rights. The Respondents, instead, initiated their investigation to identify the anonymous author[s] due to the fear of harm that these documents could cause and the dissention, strife and unrest which theoretically might have arisen among students and faculty. Once the investigation was underway, the Respondents hired handwriting analysts, private investigators and ordered the District's Police Chief to assist them. Their actions also included obtaining documents from confidential personnel files and singling out a discrete group of District employees based merely upon their prior disputes or legal claims with them. Finally, they accused Dr. Wasson of being the anonymous author, filed charges of "evident unfitness for service" (California Education Code § 87732(d)) against her, and terminated her from her tenured position as a professor in the District, which she held for 22 years. Even though ultimately reinstated, she was forced from the classroom for three months.

The aforementioned evidence demonstrates that this investigation was more akin to an inquisition than a well supervised investigation, crafted to avoid infringing upon anyone's constitutional rights. When the Respondents' investigation concluded, Agrella acknowledged:

> *The Board and I fully acknowledge that the investigation into the hate mail has proven destructive to the College and its faculty, staff, and administrators. And as your President, I take full responsibility* (italics in original). Whether an investigation should ever have been initiated is now *highly questionable* . . . (emphasis added) [I]nstead of providing the Board advice and counsel about the matter, I withdrew from advising them, yet assisted in attempting to determine the identity of the author.

The Respondents' acts show that they failed to act with "the care that a reasonable manager would use before making an employment decision. . ." *Waters,* 511 U.S. 661 at 677-678. Furthermore, when broadly applying this holding (as the majority so intended), the Respondents had a duty to conduct their investigation reasonably. Clearly, anonymous speech activity was involved and, as previously mentioned, the Respondents should have known (through the advice of counsel or otherwise) that Dr. Wasson had to, and in fact, *was obligated to* deny her authorship or involvement with the dissemination of the anonymous documents *at all times* in order to preserve her First Amendment right to engage in anonymous speech. Recognizing these facts and broadly applying *Waters* demonstrates that the Respondents had a duty to act as "reasonable managers" when investigating what was said as well as (and pertinent to this case) what was not said. *Id.* at 677, *Wasson,* 203 F.3d 659 at 664 (Fletcher, J.

dissenting) (*See* App. A at 8a). The facts show that the Respondents failed to act in this manner. Furthermore, public employers violate the Free Speech Clause of the First Amendment when disciplining an employee based upon speech which the employer genuinely suspects is protected under the First Amendment. *Waters,* 511 U.S. 661 at 683 (Souter, J., concurring). The Ninth Circuit Court clearly erred in failing to apply *Waters v. Churchill* to this case.

The precedence created by the Ninth Circuit Court chills anonymous speech rights. Furthermore, since the Court condoned the chilling of Dr. Wasson's rights, more public employees will suffer the same flagrant violations of their free speech rights now that case precedence is established which permits such abuses to go unpunished. For the reasons set forth above, Dr. Wasson respectfully requests that this Court grant her Petition for Writ of Certiorari so as to resolve this important constitutional question.

ARGUMENT B

A Litigant Has Standing To Assert An Anonymous Speech Claim When Her Pleading Shows That She Suffered An "Injury In Fact" Due To A Public Employer's Efforts To Suppress The Protected Speech Of Another Person.

The Respondents initiated their investigation solely to punish the anonymous author[s]. During the course of this investigation, they erroneously concluded that Dr. Wasson was this author and terminated her based upon this allegation. Even though Dr. Wasson denied being the anonymous author, she still had standing to assert her free speech claim when her anonymous speech rights were violated.

The Ninth Circuit Court disagreed with Dr. Wasson by holding that personal and/or third party standing does not exist to assert anonymous speech claims when the litigant does not confess to being the anonymous author or being associated with the actual anonymous author. *See Wasson*, 203 F.3d 659 at 662 (*See* App. A at 6a-7a). This holding was reached by the Court reasoning that since Dr. Wasson denied authoring the six anonymous documents, there was no protected speech activity. *Id.* at 662 (*See* App. A at 5a). The Court found that her denial evidenced an absence of a direct injury to her free speech rights, which would otherwise have allowed a federal court to adjudicate her claim. *Id.* The Court's reasoning was also guided by a critical mischaracterization of this case. It assumed that Dr. Wasson's anonymous speech claim was based upon the Respondents incorrectly accusing her of authoring the six anonymous documents. *Wasson,* 202 F.3d 659 at 663 (*See* App. A at 6a). Thus, it relied upon precedence from *Waters v. Churchill* to reason that "the Supreme Court has never held that it is a violation of the Constitution for a governmental employer to discharge an employee based on substantively incorrect information." *Id.* (internal citations omitted). As mentioned, Dr. Wasson did not base her anonymous speech claim upon the Respondents incorrect accusation that she was the anonymous author. Rather, this claim is based upon the chilling of her anonymous speech right.

More importantly, the Ninth Circuit Court's denial of standing to Dr. Wasson establishes precedence undermining anonymous speech rights. By denying Dr. Wasson standing to assert her anonymous speech claim, the Court holds that individuals not engaging in protected speech, but whose free speech rights are chilled by a state entity seeking to suppress this speech, can be punished for the protected speech of another. Following this reasoning, these individuals, like Dr. Wasson, are left helpless to vindicate this right when they are unwilling to waive it, even when confronted by government

coercion to do so. Consequently, people such as Dr. Wasson are left without a remedy to redress violations to their respective anonymous speech rights. The precedence *Wasson* creates undermines and is contrary to that from *Marbury v. Madison,* 1 Cranch 137 (5 U.S. 137), 2 L.Ed.2d (1803). That case held that "the very essence of civil liberties certainly consists in the right of every individual to claim the protection under the laws, whenever he receives an injury." *Id.* at 163. Chief Justice Marshall elaborated on this principle by explaining:

> it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded. . . [I]t is a well settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress. *Id.* at 162-163.

Contrary to the Ninth Circuit Court's holding, standing exists for Dr. Wasson to assert her anonymous speech claim even though the Respondents' actions were misdirected at her as the presumptive anonymous author and based upon that person's protected speech. As a general rule, Article III of the United States Constitution requires a party invoking a court's authority to show that she personally has suffered some actual or threatened injury as a result of the illegal conduct of the defendant. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 at 472; *citing Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979). The court must find that this injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. *Id.*; *citing Simon v. Eastern Kentucky Welfare Rights Org.*, 426

U.S. 26, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976). *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), however, held that *indirect harms* suffered by a party do not necessarily preclude standing. When government actions imposed upon one party cause specific harm to a third party and this harm is intended to be prevented by a constitutional or statutory provision, the indirectness of this injury may make the existence of standing under Article III substantially more difficult, *but the party is not entirely deprived of standing to vindicate her rights. Id.* at 505 (emphasis added). Indirect standing exists when a plaintiff offers "specific concrete facts" showing that the actions harmed her and that she personally would benefit in a tangible way from the court's intervention. *Id.* at 508; *Wyoming v. Oklahoma,* 502 U.S. 437, 465, 112 S.Ct. 789, 806, 117 L.Ed.2d 1 (1992).

The Ninth Circuit Court's holding that standing exists only when a direct injury is suffered by the plaintiff is contrary to the precedence of *Warth* and *Wyoming*. Furthermore, as previously mentioned, narrowing the scope for standing to assert anonymous speech claims, as the Court has done, is contrary to the precedence from *Marbury v. Madison*, by denying an entire class of plaintiffs (those like Dr. Wasson who have suffered actual injuries to their free speech rights based upon the protected speech of another person) the ability to vindicate this right. *See Marbury,* 5 U.S. 137 at 162-163. This Court certainly cannot affirm such a principle. The facts presented to the Ninth Circuit Court clearly showed that the Respondents directly chilled Dr. Wasson's free speech rights, inclusive of her anonymous speech right, by punishing her to suppress the protected speech of an unknown person. These facts show a causal connection between the Respondents' actions and the chilling of Dr. Wasson's free speech rights, inclusive of her anonymous speech right.

Dr. Wasson must also benefit from her ability to assert her anonymous speech claim against the Respondents. *Warth,* 422 U.S. 490 at 508. If Dr. Wasson could vindicate her anonymous speech right, she would be able to end the Respondents' suppression and chilling of this right. Hence, if she desired, she could write anonymously or engage in any other form of protected speech without fear of intimidation or termination. Presently, she does not have this liberty. The Respondents terminated Dr. Wasson based upon the anonymous author's protected speech. They subsequently withdrew their charge of "evident unfitness for service" (California Education Code § 87732(d)), without prejudice. Thus allowing the Respondents, under California Education Code §§ 87675 and 87680 to reinitiate this charge until October 28, 2000. This capability chills Dr. Wasson's ability to engage in *any* form of protected speech. Moreover, since the Ninth Circuit Court has affirmed Respondents' right to punish its employees for the protected speech of another, Dr. Wasson's rights of freedom of speech and association, as well as those of her fellow District employees, will continue to be chilled unless remedial action is taken by this Court.

In summary, the Ninth Circuit Court's decision diminishes the opportunity for parties, such as Dr. Wasson, to assert claims against public employers by undermining precedence from this Court relating to Article III standing. To reiterate, *Warth v. Seldin* holds that when government actions imposed upon one party indirectly cause specific harm to a third party and this harm is intended to be prevented by a constitutional or statutory provision, the indirectness of this injury may make the existence of standing under Article III substantially more difficult, but the party is not entirely deprived of standing to vindicate her rights. *Warth*, 422 U.S. 490 at 505. Indirect standing exists when a plaintiff offers "specific concrete facts" showing that the actions harmed her and that she personally would benefit in a tangible way from

the court's intervention. *Id.* at 508; *Wyoming v. Oklahoma,* 502 U.S. 437 at 465. The facts clearly show that the Respondents' investigation to identify the author of the six anonymous documents was initially targeted at this unknown person. These actions, however, caused a specific harm to Dr. Wasson's anonymous speech rights. Moreover, Respondents' punishment of Dr. Wasson for being the presumptive author caused her direct, serious and ongoing harm. These facts specifically and concretely showed that a causal connection or direct relationship existed between the Respondents' actions and the injuries to her protected speech rights.

The Ninth Circuit Court erred by denying standing to Dr. Wasson to assert her protected speech claim by assuming that this claim was based upon the Respondents' false accusation that she was the anonymous author. This is not true. This claim is based upon the Respondents' actions chilling her individual speech right and punishing her for the protected speech of another.

Pursuant to *Warth*, these facts clearly show that Dr. Wasson had standing to assert her protected speech claim. The Ninth Circuit Court's mischaracterization of this case and its improper application of the law relating to Article III standing require this Court to grant Dr. Wasson's Petition for Writ of Certiorari so as to correct these fundamental errors which impair the ability to protect free speech rights and contradict the precedence from *Warth v. Seldin*.

CONCLUSION

The future of anonymous speech rights is threatened by Ninth Circuit Court's abandonment of case precedence from this Court. When litigants, such as Dr. Wasson, are required to waive their right to anonymity or identify their relationship to an anonymous author in order to prove they suffered an "injury

in fact" and, thereby have standing to assert their respective anonymous speech claims, this right will inevitably be chilled, if not destroyed. Moreover, when individuals cherish their anonymous speech rights to the extent that they are unwilling to waive them, even when confronting government coercion to do so, they are left helpless to vindicate infringements of this right and can be punished for the protected speech of another. This precedence is *exactly* what the Ninth Circuit Court established in *Wasson v. Sonoma County Junior College Dist., et al.*

The Court's holding has two consequences, both undermining anonymous speech rights. First, protected speech by anonymous authors will be chilled when individuals realize that they can speak anonymously, but if a state actor punishes them for exercising this right, they must reveal their respective identity or their association with such speakers to vindicate this right. This Court has observed that authors speak anonymously to avoid reprisal for their willingness to express their views or opinions on matters of public concern. Only the most fervent or dedicated anonymous speaker will waive this right to vindicate it. The others will choose the easier course of action and not speak at all, fearing retaliation when their respective identity is revealed. This Court must not allow this to happen.

Wasson v. Sonoma County Junior College Dist., et al. also bestows tremendous and abusive power on public employers. The Ninth Circuit Court creates precedence which allows for the punishment of public employees for protected speech even when the employer is unable to identify its source. In this case, a public employer terminated one employee and publicly vilified her to discourage all forms of critical free speech at a public college. According to the Ninth Circuit Court, these actions are permissible as being within the Respondents' power as public employers. In accordance with this reasoning, the Respondents could have also permissibly

terminated the other two employees they suspected of authoring these anonymous documents, or even an unlimited number they suspected as being potential authors of the anonymous documents. Following this reasoning, such actions could continue until one employee waived his or her anonymous speech right and confessed (whether truthfully or out of martyrdom) that he or she was the anonymous author. First Amendment protection of anonymous speech cannot be contingent upon the high price of requiring individuals to admit to authorship, explain her association with an author or identify the anonymous author.

The Ninth Circuit Court's standing requirement provides insufficient protection to anonymous speech and, therefore, is detrimental to the preservation of this First Amendment right. To preserve and protect the First Amendment right to speak anonymously, it is respectfully requested that this Court grant Dr. Wasson's Petition for Writ of Certiorari.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed February 16, 2000]

No. 98-15967

SYLVIA J. WASSON, an individual,
Plaintiff-Appellant,

v.

SONOMA COUNTY JUNIOR COLLEGE; GOVERNING BOARD OF THE SONOMA COUNTY JUNIOR COLLEGE DISTRICT; ROBERT F. AGRELLA; JAMES MITCHELL; JOHN ROBERTS,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding
D.C. No. CV-97-02767-WHO

Before: Mary M. Schroeder, Betty B. Fletcher, and Cynthia Holcomb Hall, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

The dispositive issue is whether a public employee can maintain a claim that her employer wrongfully retaliated against her for the exercise of First Amendment rights to free speech when she denies having made the speech in question. We conclude that the plaintiff fails to state a First Amendment claim in these circumstances because she cannot show the alleged wrongful conduct was in retaliation for any exercise of her free speech rights.

Sylvia Wasson is a professor in the Sonoma County Junior College District ("the District"). She filed this suit against District President Robert Agrella and District Vice President John Roberts after they recommended Wasson's termination to the District's Governing Board. It is undisputed that defendants sought to fire Wasson because they believed her to be the author of six publicly disseminated writings that vilified Agrella. Wasson vigorously denies that she is the author of these writings. The district court granted defendants' motion to dismiss Wasson's First Amendment claim on the basis of qualified immunity. We affirm on different grounds because we conclude that Wasson has failed to state a claim.

FACTS

From August 1995 to October 1996, a series of five anonymous letters and one anonymous flyer ("the letters") were disseminated throughout the college community of the District. The letters accused Agrella of various types of misconduct. The District's Governing Board ("the Board") responded to these letters by launching an investigation to determine who authored the letters. The Board empowered District counsel Robert Henry to hire a private investigator and a document examiner to assist in the investigation.

Wasson was identified as one of three individuals whom Agrella suspected as the author of the letters. At the time, Wasson was employed as an instructor by the District. Agrella authorized that Wasson's personnel file be turned over to the document examiner. Based on a comparison of handwriting and prose style, the document examiner concluded that Wasson wrote the letters. Wasson denies that she is the author or disseminator of the letters. On the basis that Wasson's alleged authorship of the letters constituted "evident unfitness for service," Roberts presented to the Board a recommendation for Wasson's dismissal on January 14, 1997. The recommendation included a Statement of Charges that stated, in pertinent part:

> Individually and collectively, these [letters] contain statements about Dr. Robert Agrella, the Superintendent/President of Sonoma County Junior College District, that are false and defamatory and which had the purpose or effect of undermining his leadership of the

> College District and that brought public discredit to the College District.

The Board adopted the recommendation and issued a Notice of Decision to Dismiss Wasson that day. Wasson alleges that Roberts may have been ordered by Agrella to present the recommendation to the Board. Thus, for purposes of the defendants' motion to dismiss, we assume that both Agrella and Roberts recommended Wasson's dismissal.

Wasson was placed on paid leave pending an administrative appeal of her termination. On March 24, 1997, the Board withdrew without prejudice the Notice of Decision to Dismiss and reinstated Wasson to her instructor position. She is currently employed by the District in that position. Wasson alleges, however, that the Board can terminate her at any time until October 28, 2000 by reinstating the Notice of Decision to Dismiss.

Wasson's First Amended Complaint, which we review here, names only Agrella and Roberts as defendants. She contends that the defendants violated her free speech rights by (1) their conduct in investigating the letters, which led to their conclusion that Wasson was the author; and (2) the defendants' role in recommending that Wasson be terminated on the basis that she wrote the letters. The district court granted qualified immunity to Agrella and Roberts on their motion to reconsider the district court's earlier denial of the defendants' motion to dismiss.

DISCUSSION

It is well-settled that the First Amendment precludes retaliation by a public employer against an employee on the basis of certain instances of protected speech by the employee. *See Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). A public employee's speech is protected when it relates to a matter of public concern, *see Connick,* 461 U.S. at 146, and the employee's interest in engaging in such speech outweighs the public employer's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568.

This First Amendment case is unusual because Wasson asserts that the defendants retaliated against her for speech that she insists she did not make. Accepting Wasson's allegations as true, she thus has not engaged in any relevant constitutionally protected speech. Yet, she claims that her free speech rights under the First Amendment were violated because the defendants falsely imputed to her the letters critical of Agrella.

Several of our sister circuits have rejected claims identical to Wasson's, holding that there can be no First Amendment cause of action where there was no speech by the plaintiff. *See Jones v. Collins,* 132 F.3d 1048, 1054 (5th Cir. 1998); *Fogarty v. Boles,* 121 F.3d 886, 890-91 (3d Cir. 1997); *Barkoo v. Melby,* 901 F.2d 613,619 (7th Cir. 1990). This circuit, although never squarely addressing the issue in question, has recognized that a plaintiff must demonstrate that she has engaged in constitutionally protected expression to establish a First Amendment retaliation claim. *See Moran v.*

Washington, 147 F.3d 839, 846 (9th Cir. 1998) (citing *Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 675 (1996)). Having denied that she wrote the letters, Wasson undermines her claim that the defendants' conduct impermissibly chilled her speech. "[A] free speech claim depends on speech, and there was none in this case." *Fogarty,* 121 F.3d at 890.

A First Amendment retaliation claim is not a wrongful termination claim. Rather, a First Amendment retaliation claim seeks to vindicate a public employee's exercise of free speech rights when she has suffered an adverse employment action in response to having spoken out publicly. It cannot be used to remedy a case of mistaken identity. In fact, the Supreme Court has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Waters v. Churchill,* 511 U.S. 661, 679 (1994). Accordingly, there can be no First Amendment claim when an employee is falsely accused of making statements uttered by someone else.

Wasson argues that she should be able to maintain her action because she is defending the First Amendment rights of the anonymous author of the letters. Wasson is certainly correct to point out that an author's anonymity is an aspect of free speech protected by the First Amendment. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-42 (1995). She fails to explain, however, how she has standing to assert the anonymous author's rights. Parties ordinarily are not permitted to assert constitutional rights other than their own. *See NAACP v. Alabama,* 357 U.S. 449, 459 (1958). A litigant can maintain "third party" standing only when she satisfies a three-prong test: (1) the litigant must have suffered an "injury in fact," (2) the litigant must have a close relation

to the third party, and (3) there must exist some hindrance to the third party's ability to protect his or her own interests. *Powers v. Ohio,* 499 U.S. 400, 410-11 (1991). Wasson, at a minimum, fails the second prong because she has established no relationship between herself and the anonymous author.

Wasson also suggests that defendants violated the First Amendment because they conducted an unreasonable investigation to determine that she was the alleged author of the letters. In *Waters v. Churchill,* 511 U.S. 661 (1994), Justice O'Connor's plurality opinion acknowledged that a public employer violates the First Amendment when it employs "procedures outside the range of what a reasonable manager would use" to determine what an employee supposedly said. *Id.* at 678. The facts of *Waters* demonstrate, however, that it does not apply to a situation where the employee denies having spoken at all. In *Waters,* the employer received two different versions of plaintiff's speech: one version would have been protected under the First Amendment while the other could permissibly have served as the basis for plaintiff's discharge. *Id.* at 665-66; *see Fogarty,* 121 F.3d at 889. Justice O'Connor reasoned that the employer is subject to liability under the First Amendment if an unreasonable investigation led it to believe the unprotected version of plaintiff's speech. The logic behind *Waters* is that an employer that fails to conduct a reasonable investigation may not escape liability for mistaken retaliation against an employee who has engaged in protected speech. The case concerned a mistake about the content of the plaintiff's speech, not about the identity of the speaker.

AFFIRMED.

B. FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent. The majority disposes of this case on the grounds that Sylvia Wasson failed to state a claim under the First Amendment. It holds that because she denies writing a series of letters that were imputed to her by her employer, she has no standing to challenge and seek recompense for the retaliation she suffered -- a threat of firing, placement on forced administrative leave, and public humiliation. The majority completely ignores the chilling effect its holding will have on her as well as other individuals seeking to exercise their right to speak anonymously.

The majority would resolve this case by finding that Wasson does not have standing to assert another's rights to anonymous speech. But the right at stake is *her* right not to be retaliated against for speech she either made anonymously or did not make at all. She has been injured. The majority, finds *Waters V. Churchill,* 511 U.S. 661 (1994) inapplicable because in *Waters* the plaintiff acknowledged speaking but disputed what was said. Justice O'Connor's plurality opinion acknowledged that a public employer violates the First Amendment when it does not conduct a reasonable investigation as to what was said. I would find *Waters* fully applicable in the setting of this case: to determine what wasn't said by the employee is equally as important as determining what was said. In this case as well as *Waters,* the issue is whether the employee was wrongfully accused and whether the utterance was or was not protected.

The employer should not escape liability unless it proves both that Wasson was the speaker *and* further, that if

she were the speaker, her speech was not protected (i.e. not on a subject of public importance).

Anonymous speech has long been protected by the First Amendment. As the Supreme Court has reminded us, "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California,* 362 U.S. 60, 64 (1960); *see also McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995) (discussing central role of anonymous speech in free marketplace of ideas). I cannot join the majority in holding that the protection provided by the First Amendment does not extend to Wasson, an individual who has been targeted and punished for allegedly uttering anonymous speech on the grounds that she denies making the statements at issue.

APPENDIX B

DO NOT PUBLISH OR INCLUDE IN DATABASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed April 22, 1998]

No. C-97-2767 WHO

SYLVIA J. WASSON,
Plaintiff,

v.

ROBERT F. AGRELLA and JOHN ROBERTS,
Defendants.

JUDGMENT

This matter having come before the Court, and the issues having been duly presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The Court declines to exercise supplemental jurisdiction over plaintiff Sylvia J. Wasson's state law claims for intentional and negligent infliction of emotional distress.

Those claims are dismissed, with leave to reassert them in the state court action.

2. Defendants Robert F. Agrella and John Roberts' motion to dismiss the First Amendment claims against them, is GRANTED with prejudice, on the basis of qualified immunity and failure to state a claim.

3. The federal action is dismissed, and all remaining claims will be heard in the state court action.

Dated: April 22, 1998.

/s/_____
William H. Orrick
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed December 5, 1997]

No. C-97-2767 WHO

SYLVIA J. WASSON, an individual, *Plaintiff*,	)
v.	)
SONOMA COUNTY JUNIOR COLLEGE DISTRICT; GOVERNING BOARD OF THE SONOMA COUNTY JUNIOR COLLEGE DISTRICT; ROBERT F. AGRELLA; JAMES MITCHELL and JOHN ROBERTS, *Defendants*.	)

OPINION AND ORDER

In this action, plaintiff Sylvia J. Wasson ("Wasson") brings a large assortment of federal and state constitutional and common law claims against various defendants associated

with the Sonoma County Junior College District ("District"). Wasson's claims are for acts related to defendants' attempt to terminate her for distributing anonymous letters critical of President Robert F. Agrella ("Argella") of Santa Rosa Junior College. Defendants now move to dismiss all claims. Defendants also move to disqualify Wasson's counsel because an attorney now associated with Wasson's counsel once represented Agrella and his wife during their divorce. For the reasons hereinafter set forth, the motion to dismiss is granted in part, and denied in part. The motion to disqualify is denied.

I.

The following statement of facts is summarized from Wasson's complaint. Wasson has been an employee of the District as an instructor or administrator at Santa Rosa Junior College for twenty-two years. The District is a public school district in Sonoma County, California. Defendant Governing Board of the Sonoma County Junior College District ("Governing Board") is responsible for the policies, practices and customs of the District, including the dismissal of faculty. Defendant Agrella is President of the District. Defendant James Mitchell ("Mitchell") is Personnel Director of the District. Defendant John Roberts ("Roberts") is Vice President of Business Services for the District.

During the 1992-93 and 1993-94 school years, an unspecified dispute arose between Wasson and the District, which was resolved by a settlement in April 1994. In accordance with the terms of the settlement agreement, Wasson resigned as an administrator and returned to full-time classroom teaching. The District agreed to "[m]ake all future

decisions with respect to WASSON's employment with DISTRICT on a good faith basis without regard to any of the events that led to this agreement." (Compl. ¶ 10 and Ex. A.)

Wasson continued to teach full time until January 14, 1997, when the Governing Board issued a "Statement of Decision to Dismiss" Wasson from her teaching position. The decision to dismiss was based on Wasson's alleged "evident unfitness for service." (Id. ¶ 12 and Ex. L.) The Statement of Charges attached to the Governing Board's Notice of Decision to Dismiss ("Notice") alleged that Wasson was responsible for preparing and distributing an anonymous flier and five anonymous letters (collectively "the letters"), all of which were critical of Agrella, his administration, and the Governing Board. The letters were circulated at various times between August 1995 and October 1996. Wasson's alleged preparation of the letters is the sole ground listed in the Statement of Charges for Wasson's dismissal. Wasson contends that she is not the author or disseminator of the letters. (Id. ¶ 33.) Wasson also contends that many of the allegations in the letters were true, and that the Governing Board failed to properly investigate the truth of any of the allegations in the anonymous letters before deciding to terminate her.

In the spring of 1996, after Agrella advised the Governing Board of his conclusion that the letters were authored by a District employee, the Governing Board conducted an investigation. Agrella identified three individuals who he believed might be the author of the letters. During the course of the investigation, Agrella authorized Mitchell to obtain materials from confidential personnel files, including Wasson's file, to be examined as part of the

investigation. The Governing Board's Personnel Files and Confidentiality Policy provides that "[a]ll personnel files will be considered confidential and will not be available to persons other than the employee and those authorized on a 'need-to-know' basis by the Superintendent/ President." (Id. ¶ 22 and Ex. I.) The contract between the All Faculty Association and the District also provides that "[t]he contents of all personnel files shall be kept in the strictest confidence." (Id. ¶ 23, and Ex. J at 72, ¶ 20.1B.)

In late April 1996, the writings and documents from the personnel files were delivered to document examiner Patricia Fisher, who reviewed the documents and formed the opinion that the handwriting on one envelope and the prose style of the anonymous letters were that of Wasson. Fisher then requested additional exemplars of Wasson's writing, including those obtainable from computer fonts, typewriters and photocopiers.

Agrella then requested the Chief of Campus Police, Terry Stewart, to identify the location of the computer printers, typewriters and photocopiers, which might have been available for use by Wasson. In early May 1996, forty-nine machines in thirteen different locations were sampled, and in at least eleven instances documents were retrieved and printed that had personal content. The District's Computer and Communications Technology Use Policy provides that "[p]rograms and files are confidential unless they have explicitly been made available to other authorized individuals." (Id. ¶ 27 and Ex. K at 2, ¶ 7.)

Wasson first received notice of the Governing Board's intent to dismiss her when Stewart confronted her in her

driveway at home on January 14, 1997 by positioning his unmarked vehicle directly behind her vehicle, effectively blocking her in her garage. Wasson was blinded by the headlights of Stewart's vehicle, was unable to identify the occupant of the vehicle, and was fearful of being attacked in her garage. Stewart, without exiting his vehicle, rolled down his window, identified himself, and handed Wasson a manila envelope containing the Governing Board's Notice.

Wasson contends that she was not given an opportunity for a pretermination hearing or to have the charges against her heard in open session upon twenty-four hours notice, as is allegedly provided for under the Brown Act. Cal. Gov't Code § 54957. After being removed from the classroom, Wasson sought a temporary restraining order ("TRO") in the Superior Court of Sonoma County to enjoin the District from terminating her. The TRO was granted with the condition that Wasson be placed on paid administrative leave pending a hearing on whether a preliminary injunction should be granted.

On March 27, 1997, the District withdrew the charges against Wasson, without prejudice. Wasson contends that this withdrawal of charges without prejudice allows the District to reinstate the identical charges against her at any time within the next four years, which is a threat that curtails her employment rights during this period. In light of the District's withdrawal of the charges, and Wasson's reinstatement to her full-time teaching position, Wasson dismissed her state court action, without prejudice, on May 7, 1997.

On March 25, 1997, Agrella issued a letter to the college community in which he and the Governing Board acknowledged that the investigation had proven destructive to the college and its faculty, staff and administrators. Agrella labeled the letters as "hate mail." Agrella issued a public apology to the individuals who were identified as being part of the handwriting investigation. He acknowledged that personnel information was expected to be treated confidentially and that access to such areas should be done openly, and not in a clandestine manner. (Compl. ¶ 36 and Ex. M.)

On March 17, 1997, the Governing Board hired attorney Michael O'Donnell to complete a review of the investigation of Wasson. A report entitled "Report On Investigation Into Issues Surrounding Dismissal (Now Withdrawn) Against Dr. Sylvia Wasson" ("Report") was released to the public on April 11, 1997, allegedly as part of the Governing Board's ongoing campaign to defame, vilify and intimidate Wasson. (Compl. ¶ 37.) A section of the Report discussing "Other Harassment of Dr. Agrella" allegedly accused Wasson, directly and by innuendo, of carrying out a harassment campaign against Agrella in 1995 and 1996, which included numerous abusive and harassing telephone messages, eavesdropping, forgery, and vandalism to Agrella's personal vehicle. The Report accused Wasson of being the author of the letters, and stated that the Governing Board concluded that Wasson was of unfit moral character, lacked emotional stability, and was unfit to continue as an employee of the District. The Report was widely distributed and republished to faculty, administration, staff and the community at large in Sonoma County. The Report allegedly has caused harm to Wasson's professional reputation and

standing within the academic community and the community at large.

The Report was also released by the District to the Chronicle of Higher Education, a preeminent national academic publication. In a story dated June 6, 1997, certain of the Report's allegedly libelous allegations against Wasson were republished, allegedly causing damage to Wasson's professional reputation and academic employment on a national scale.

II.

Wasson asserts a potpourri of federal claims, pursuant to 42 U.S.C. § 1983, and pendent state claims against the defendants, including the following:

1. Her dismissal because of defendants' incorrect belief that she authored the letters violated her right to exercise free speech as guaranteed by the First Amendment of the United States Constitution and Article I, section 2 of the California Constitution.

2. Her dismissal without formal notice of any charges against her and without an opportunity to present her side of the matter prior to dismissal violated her property interest in employment and her liberty interest in her good name, without due process, in violation of the Fourteenth Amendment of the United States Constitution, and Article I, section 7 of the California Constitution.

3. The retrieval and dissemination of documents from her personnel file and her computer constituted an

unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution, and Article I, section 13 of the California Constitution.

4. This allegedly unlawful search and seizure constituted an invasion of privacy in violation of the Ninth and Fourteenth Amendments of the United States Constitution, and Article I, section 1 of the California Constitution, and state common law.

5. Claims for defamation and false light publicity based upon defendants' publication of false statements about her.

6. Claims for breach of contract, and tortious breach of the covenant of good faith and fair dealing, for breach of the provision in the parties' 1994 settlement agreement that all future decisions with respect to Wasson's employment would be made on a good faith basis.

7 Claims for negligent and intentional infliction of emotional distress.

A.

At the outset, defendants raise the important threshold question whether all claims against all of the defendants are barred by the Eleventh Amendment of the United States Constitution. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects

of any Foreign State." U.S. Const. amend. XI. The Supreme Court has interpreted the Eleventh Amendment to provide that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (citing Employees of the Dept. of Pub. Health & Welfare, State of Missouri v. Department of Public Health & Welfare, State of Missouri, 411 U.S. 279, 280 (1973)). The Eleventh Amendment also bars all suits in federal court against state agencies or departments, regardless of the nature of the relief sought. Id. at 100. Cities and counties, however, do not enjoy Eleventh Amendment immunity. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 37 (1994). Accordingly, the Court must determine whether the District is an arm of the state, or is more like a county or city.

The Ninth Circuit has held that a court must consider the following factors in determining whether an entity is an arm of the state: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state; and (5) the corporate status of the entity. Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988) (citing Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982)), cert. denied, 490 U.S. 1081 (1989). The most crucial question is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury. Hayakawa, 682 F.2d at 1350.

In Mitchell, the Ninth Circuit found that the Los Angeles Community College District was an arm of the state because its budget was made up of funds received from the state's general fund and because some of the fees charged by the district's colleges go to the state. 861 F.2d at 201. The court also noted that previous cases had determined that California state colleges and universities are considered to be state agencies. Id. The court concluded that the Los Angeles Community College District was a state agency for Eleventh Amendment purposes. Id.; see also Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 972 (9th Cir. 1994) (citing Mitchell as holding that community college districts are dependent instrumentalities of the state of California, and finding that the San Francisco Community College District was a state agency with Eleventh Amendment immunity); Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 251-54 (9th Cir. 1992) (concluding, after exhaustive analysis, that California public school districts are immune from suits in federal court under the Eleventh Amendment).

Both parties acknowledge that the District is a California community college district. There is nothing in Mitchell or Cerrato to suggest that individual community college districts in California might be treated differently for purposes of the Eleventh Amendment. Although Wasson provides detailed arguments as to why the Court should not follow Mitchell, those arguments apply generally to all California community colleges, and are better made to the Ninth Circuit en banc. This Court is bound to follow Mitchell and Cerrato and finds that the District is a state agency for purposes of the Eleventh Amendment. Accordingly, all claims against the District and the Governing Board are dismissed, without prejudice to refiling in state court.

B.

The Court next turns to the claims against the individual defendants. To determine whether a federal suit against a state official is barred by the Eleventh Amendment, the Court must look to whether the official is sued in his official or individual capacity.

1.

The Eleventh Amendment does not bar federal court, suits against a state officer in his individual capacity, regardless of the relief sought. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974); Ashker v. California Dept. of Corrections, 112 F.3d 392, 394 (9th Cir. 1997), (citing Pena v. Gardner, 976 F.2d 469, 472-74 (9th Cir. 1992)), cert. denied, 118 S. Ct. 168 (1997). The Court determines whether an official is sued in his official capacity or in his individual capacity by "reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." Id. at 395 (quoting Hafer v. Melo, 502 U.S. 21, 26 (1991)).

Here, Agrella, Mitchell and Roberts are all sued in both their individual and official capacities. Defendants do not move to dismiss the claims against the individual defendants in their individual capacities on the basis of Eleventh Amendment immunity.

2.

Federal court suits against state officials in their official capacities may or may not be barred by the Eleventh

Amendment, depending upon the relief sought and whether the suit is brought under federal or state law.

a.

When a plaintiff sues a state official in his or her official capacity for a violation of federal constitutional or statutory law, the federal court may award an injunction governing the official's future conduct, but may not award retroactive monetary relief. Pennhurst, 465 U.S. at 102-03 (citing Edelman v. Jordan, 415 U.S. 651, 666-67 (1974) and Ex Parte Young, 209 U.S. 123 (1908)). Permitting prospective injunctive relief against state officials for violations of federal law reconciles the competing interests of (1) promoting the supremacy of federal law and (2) accommodating the constitutional immunity of the States. Id. at 105-06. Wasson asserts numerous claims under 42 U.S.C. § 1983 against the individual defendants seeking damages and injunctive relief. A state official is not a person for purposes of § 1983 and may not be sued under § 1983 in his official capacity for damages, although he may be sued for injunctive relief. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); Hafer, 502 U.S. at 27. The § 1983 claims against the individual defendants in their official capacities are all dismissed, without prejudice to refiling in state court, to the extent Wasson seeks damages.

b.

Federal court suits asserting state law claims against state officials in their official capacities are barred where the relief sought has an impact directly on the state itself. Pennhurst, 465 U.S. at 117. Such suits against state officials

are considered to be suits against the state "if 'the judgment would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Id. at 100 and n. 11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)) (citations omitted). "[A] suit against state officials [based on state law] that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." Id at 102. Indeed, a federal court may never enjoin a state official from violating state law. Id. at 106.

Defendants move to dismiss, pursuant to the Eleventh Amendment, the state law claims asserted against the individual defendants in their official capacities to the extent Wasson seeks injunctive relief, but do not explicitly move to dismiss the state law claims against the individual defendants to the extent Wasson seeks damages.[1] Following Pennhurst, the Court grants the motion to dismiss the state law injunctive relief claims.

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[1] The Court declines to consider the arguments on this point that appear for the first time in defendants' reply brief. Defendants may reassert the argument if and when Wasson files an amended complaint. The Court notes that although California has an indemnification statute that requires the state to pay damage awards imposed against state officials for acts performed during the course of their official duties, Cal. Gov. Code § 825, that is not enough by itself to treat actions against state officials as actions against the state. Demery v. Kupperman, 735 F.2d 1139, 1147 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985).

C.

Having ruled on the Eleventh Amendment motion, all claims against the District and the Board are dismissed. The remaining claims against the individual defendants are: (1) all federal and state law claims against them in their individual capacities; (2) all federal claims against them in their official capacities, but only to the extent Wasson seeks injunctive relief; (3) all state law claims against them in their official capacities, but only to the extent Wasson seeks damages.

D.

Roberts and Mitchell move to dismiss all claims against them for lack of sufficient factual allegations of unlawful acts or omissions. The Court agrees that, in general, the allegations against Roberts and Mitchell are sketchy and conclusory. Rather than examine in detail the specific allegations against Roberts and Mitchell with respect to each claim, the Court will simply grant their motion to dismiss, with leave to amend. In doing so, the Court does not hold that all allegations against Roberts and Mitchell are insufficient as a matter of law, but simply agrees that Wasson needs to provide more notice to Roberts and Mitchell of the specific legal and factual allegations against them.

E.

The individual defendants move to dismiss the § 1983 claims against them on the basis of qualified immunity, and for failure to state a claim. The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is limited to actions for damages against a government official in his individual capacity; it is not available when an official is sued in his official capacity, Brandon v. Holt, 469 U.S. 464, 472-73 (1985); Owen v. City of Independence, 445 U.S. 622, 651 (1980), nor is it available when the only relief sought is injunctive. American Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991). Accordingly, qualified immunity is available, if at all, only for the § 1983 claims for damages asserted against the individual defendants in their individual capacities.

The test for qualified immunity test is a two-part inquiry: (1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable official have believed his conduct was lawful? Act Up!/Portland v. Bagley, 988 F.2d 868, 871-72 (9th Cir. 1993). The plaintiff bears the burden of proving the existence of a "clearly established" right at the time of the allegedly impermissible conduct. Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992). If the plaintiff meets this burden, then the defendant bears the burden of establishing that his actions were reasonable, even if they violated the plaintiff's constitutional rights. Id. at 523. Wasson asserts § 1983 claims for violations of the First, Fourth, Ninth and Fourteenth amendments to the United States Constitution.

Wasson also bases her § 1983 claims on various provisions of the California Constitution. A § 1983 claim, however, may only be based on violation of a right secured by the Constitution and laws of the United States. West v.

Atkins, 487 U.S. 42, 48 (1987). Accordingly, Wasson's § 1983 claims based on violations of the California Constitution are dismissed.

1.

It is clearly established that public employees cannot be disciplined solely for exercising their First Amendment rights by speaking on a matter of public concern. Connick v. Myers, 461 U.S. 138, 140 (1983). To determine whether a particular instance of discipline was a violation of the First Amendment requires balancing the interests of the employee in commenting upon matters of public concern against the interest of the State in promoting the efficiency of the public services it performs through its employees. Id.

The letters for which Wasson was disciplined comment upon Agrella's fitness to be president of the college, a matter that is clearly of public concern. If defendants based their decision to terminate Wesson on an unreasonable belief that Wesson engaged in unprotected speech, and Wasson did not do so, defendants may have violated the First Amendment. See Waters v. Churchill, 511 U.S. 661, 667-68 (1994).

Wesson alleges that defendants terminated her without properly investigating the source of the letters or the truth of the allegations in the letters. She states that she did not, in fact, write the letters. She also contends that the dissemination of the letters did not disrupt the orderly administration of the college or negatively impact the education offered in the district. The Court cannot find that defendants' actions, as alleged, could have been viewed as lawful by a reasonable official. Accordingly, defendants'

motion to dismiss the First Amendment claim on the basis of qualified immunity is denied at this time.

Defendants also seek to dismiss the First Amendment claims for lack of standing and mootness. Defendants contend that because Wesson admits that she did not write the letters, she cannot claim that her First Amendment rights were infringed. The Court disagrees. Wasson's dismissal was explicitly based on defendants' belief that she had written and distributed the letters. The government may violate the First Amendment by terminating an employee because of the government's belief that the employee engaged in unprotected speech, if the government's belief was unreasonable under the circumstances, and the employee actually engaged in protected speech or did not speak at all. Id. at 669, 677-78. Wasson has standing to assert her First Amendment claim because she suffered a concrete injury in being threatened with dismissal and in being prevented from teaching by being placed on administrative leave because of defendants' belief that she wrote and distributed the letters.

Defendants also argue that the claim is moot because the notice of dismissal was withdrawn and, thus, Wasson cannot complain of having suffered any injury. This is ludicrous. Wasson was prevented from teaching for months, even though she was placed on administrative leave with pay. Moreover, the Court fails to see how the claim for injunctive relief is moot when defendants are alleged to have withdrawn the notice of dismissal without prejudice, and allegedly are not barred from initiating dismissal again on the same charges.

As for the Fourth Amendment claim, it has long been clearly established that searches and seizures of private property of employees by their government employers or supervisors are subject to the restraints of the Fourth Amendment. O'Connor v. Ortega, 480 U.S. 709, 715 (1987). The Court noted, however, "[P]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." Id. at 717. Because of the variety of work environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. Id. at 718. If the employee does have a reasonable expectation of privacy in the area that was searched, the Court must balance the invasion of those privacy interests against the government's need for supervision, control, and the efficient operation of the workplace. Id. at 719-20. "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." Id. at 725-26. Ordinarily, a search will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct. Id. at 726.

Here, the complaint alleges that the Governing Board's written policy provides that personnel files are confidential but may be available to those authorized on a need-to-know

basis by the Superintendent/President. (Compl. ¶ 22 and Ex. I.) A written policy also provides that computer programs and files are confidential unless they have been explicitly been made available to other authorized individuals. (Id. ¶ 27 and Ex. J at 2 ¶ 7.) That computer policy also provides, however, that "[t]he district reserves the right to access all information stored on district computers" with advance notice, if practical. (Id. Ex. J at 2¶ 7.) It is clear from these policies that Wasson could not have had a reasonable expectation that her personnel records and computer files could not be accessed by the district at the request of the president. There is no limitation in these policies on the purpose for which her records could be accessed at the request of the president. Accordingly, the Court finds that Wasson could not have had a reasonable expectation of privacy in her personnel files and computer files with respect to access by the district. Moreover, the individual defendants could have had a reasonable belief that their acts in accessing Wasson's personnel files and computer files was lawful. Thus, the Court dismisses, with prejudice, the § 1983 claim for violations of the Fourth Amendment, on the basis of qualified immunity and for failure to state a claim.

3.

Wasson's Fourteenth Amendment claims are based on three grounds. First, Wasson claims that she was deprived of her property interest in her employment in violation of procedural due process because she was not given formal notice of the charges against her or an opportunity to present her side of the matter prior to her termination. Second, Wasson claims that defendants violated her liberty interest by publicly accusing her falsely of disseminating the letters, and

by terminating her without notice or an opportunity to respond. Third, Wasson contends that defendants violated her right to privacy, as found in the Fourteenth and Ninth Amendments, by disclosing private information from her personnel file and computer files to the public.

a.

The Court grants defendants' motion to dismiss Wasson's claim that defendants violated due process by terminating her without notice and without an opportunity to respond, on the basis of qualified immunity and for failure to state a claim. Public employees who can be discharged only for cause have a constitutionally protected property interest in their employment and cannot be fired without due process. Gilbert v. Homar, 117 S. Ct. 1807, 1811 (1997). Prior to termination, the employee is entitled to a very limited hearing, oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story. Id. (citing Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)). The employee is entitled to a more comprehensive post-termination hearing. Id. If the employer perceives a significant hazard in keeping the employee on the job, and needs to terminate the employee immediately, any due process problem is avoided by suspending the employee with pay. Id. Wasson, by acknowledging that she was placed on paid administrative leave, cannot claim that she was deprived of a property interest in her employment, as a matter of law. *Id.*

Moreover, the documents attached to her complaint contradict her assertion that she was denied an opportunity, to contest the charges against her. Wasson alleges that she

received the Notice on January 14, 1997. (Compl. ¶ 31.) The Notice lists as enclosures the Statement of Decision to Dismiss and Statement of Charges, which explicitly list the charges against Wasson. (Id. Exs. B and L.) The Notice also provides:

> You are notified that you will be dismissed from employment with the District effective February 13, 1997. Should you request a hearing, you will remain on administrative leave and remain in paid status until a final decision is reached following a hearing.

(Id. Ex. B.) By the plain language of the attachments to her complaint, she was given notification of the charges against her and an opportunity to be heard. The notice provided that she would be paid on administrative leave pending a hearing, if she desired one. Wasson does not allege that she sought an opportunity to be heard, but was denied a hearing.

As Wasson implicitly concedes in her opposition brief, her arguments that defendants violated state law procedures, even if true, do not provide a basis for her due process claim. "The question before us is not whether [defendants'] actions were reasonable under state law, but whether the challenged conduct violates clearly established federal law, here the due process clause of the fourteenth amendment." Finkelstein v. Bergna, 924 F.2d 1449, 1452 (9th Cir.), cert. denied, 502 U.S. 818 (1991).

The allegations of the complaint demonstrate that defendants possess qualified immunity on this claim. Moreover, because Wasson alleges that she was placed on

administrative leave with pay, and was never actually terminated, her claim for deprivation of property without due process fails as a matter of law. Defendants' motion to dismiss the due process claim for violation of Wasson's property interest in her employment is granted, with prejudice.

b.

The liberty protected by the due process clause of the Fourteenth Amendment encompasses an individual's freedom to work and to earn a living. Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1100 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982). Thus, when the government dismisses an individual for reasons that might seriously damage his standing in the community, he is entitled to notice and a hearing to clear his name. Id. (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)). Only charges that seriously damage an employee's reputation or significantly foreclose her freedom to take advantage of other employment opportunities implicate the liberty interest protected by the Fourteenth Amendment. Id. at 1101. Unpublicized accusations do not infringe constitutional liberty interests because by definition, they cannot harm the employer's good name, reputation, honor, or integrity. Id. (citing Bishop v. Wood, 426 U.S. 341, 348 (1975)). Thus, the procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment or the alteration of some right or status recognized by state law. Jones v. Los Angeles Community College Dist., 702 F.2d 203, 206 (9th Cir. 1983) (citing Vanelli v. Reynolds Sch. Dist., 667 F.2d 773, 777-78 (9th

Cir. 1982)). Once the charges are validated at an evidentiary hearing that comports with due process, subsequent disclosure of the reasons for dismissal would not violate the employer's constitutional rights. Id. at 207.

As noted above, Wasson was given an opportunity to respond to the charges against her. She was never actually terminated, and defendants' plans to dismiss her ultimately were withdrawn. There is no allegation in the complaint, as defendants point out, that they made public the charges against Wasson prior to the filing of Wasson's state court complaint. There is no allegation that Wasson was forced to go public with the allegations because defendants refused to provide her with a hearing prior to her termination. Wasson could have remained silent pending the hearing on her termination. Under these circumstances, as alleged, any damage to Wasson's liberty interest was caused by her own publication of the charges against her.[2] Cf. Correa v. Nampa Sch. Dist. No. 131, 645 F.2d 814, 817 (9th Cir. 1981) ("[W]here adequate administrative procedures exist, a person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing.") Defendants' motion to dismiss the liberty claim for failure to state a claim is granted, with leave to amend.

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[2] Whether defendants' public statements about Wasson, after she made the charges public, may have been defamatory is another question. Defamation, however, is not a constitutional deprivation. Siegert v. Gilley, 500 U.S. 226, 233 (1991).

c.

The federal constitution protects at least two different kinds of privacy interests. Whalen v. Roe, 429 U.S. 589, 598-99 (1977). One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. Id. at 599-600. The latter has generally been limited to matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. Id. at 600 n. 26. There is no hint that any of these issues are involved in this case.

The federal constitutional right against disclosure of personal matters has been infrequently examined and its contours are unclear. Davis v. Bucher, 853 F.2d 718, 719 (9th Cir. 1988); Doe v. Sundquist, 106 F.3d 702, 706 (6th Cir. 1997). It is clear, however, that Wasson cannot assert any privacy claim as to information that she has already released to the public. Nixon v. Administrator of General Services, 433 U.S. 425, 459 (1977). Wasson has not alleged specifically what defendants released to the public that Wasson had not already publicized in her state court lawsuit, and for that reason alone, the federal constitutional privacy claim must be dismissed, with leave to amend.

In addition, Wasson has not specified the material defendants released to the public in enough detail for the Court to determine whether it might conceivably fall within a recognized privacy interest protected by the federal constitution. Should Wasson wish to amend this claim, she should be prepared to brief the scope of her constitutional privacy interest in greater depth than the parties have done

here. Wasson's § 1983 claim for invasion of privacy in violation of the federal constitution is dismissed, with leave to amend.

F.

The Court now turns to Wasson's state law claims against the individual defendants. Wasson asserts state law claims against one or more of the individual defendants for invasion of privacy, breach of contract, tortious breach of the covenant of good faith and fair dealing, and negligent and intentional infliction of emotional distress.[3]

1.

Defendants argue that the claims for breach of the settlement agreement and breach of the covenant of good faith and fair dealing relating to that alleged breach must be dismissed as to the individual defendants because they are not parties to the contract. The Court agrees. Because the settlement agreement expressly provides that the only parties to the agreement are Wasson and the District, those claims are dismissed with prejudice as to the individual defendants. See Compl. Ex. A at 1 ("The parties to this Agreement are SYLVIA WASSON (WASSON) and the SONOMA COUNTY JUNIOR COLLEGE DISTRICT (DISTRICT).")

---

[3] Wasson's state law claims for defamation and false light publicity are asserted only against the District and the Governing Board and are barred by the Eleventh Amendment.

Defendants argue that the remainder of the state law claims against the individual defendants -- for invasion of privacy and negligent and intentional infliction of emotional distress -- must be dismissed because the individual defendants are immune from suit on these claims, pursuant to §§ 820.2 of the California Government Code and 821.6, and § 47 of the California Civil Code.

"[I]n general, an immunity provision need not even be considered until it is determined that a cause of action would otherwise lie against the public employee or entity." Caldwell v. Montoya, 10 Cal. 4th 972, 985, 42 Cal. Rptr. 2d 842, 850 (1995). Accordingly, the Court looks first to determine whether a claim has been stated against any of the individual defendants for invasion of privacy or negligent or intentional infliction of emotional distress.

a.

The elements of a common law action for invasion of privacy are (1) a public disclosure (2) of private facts (3) which would be offensive and objectionable to a person of ordinary sensibilities. Forsher v. Bugliosi, 26 Cal. 3d 792, 808-09, 163 Cal. Rptr. 628, 637 (1980). The invasion of privacy claim is asserted against the District, the Governing Board, Roberts and Mitchell. The Court has already dismissed this claim against the District and the Governing Board because of Eleventh Amendment immunity. The Court has already dismissed all claims against Roberts and Mitchell for lack of specificity, with leave to amend. In particular, as noted above, Wasson has not alleged what Roberts and Mitchell disclosed, if anything, that was not already disclosed to the public by Wasson in her state court lawsuit. Nor has

Wasson itemized the specific private facts that were disclosed to the public. As the Court has already dismissed the invasion of privacy claim as to all defendants, it need not discuss defendants' claims of immunity.

b.

The claims for negligent and intentional infliction of emotional distress are asserted against the District, the Governing Board, Agrella and Roberts. The Court has already dismissed these claims as to the District and the Governing Board because of Eleventh Amendment immunity, and as against Roberts, for failure to plead the factual allegations against Roberts with the requisite specificity. The Court turns to the emotional distress claims against Agrella.

Negligent infliction of emotional distress is not a separate tort, but is merely the tort of negligence, to which the traditional elements of duty, breach of duty, causation and damages apply. Huggins v. Longs Drugs Stores Cal., Inc., 6 Cal. 4th 124, 129, 24 Cal. Rptr. 2d 587, 590 (1993); Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 101 (1989). The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct by the defendant that exceeds all bounds of that usually tolerated in a civilized society; (2) with the intent of causing, or reckless disregard of the probability of causing, emotional distress; (3) severe or extreme emotional distress suffered by the plaintiff; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1001, 25 Cal. Rptr. 2d 550, 574 (1993). Defendants do not argue that Wasson has failed

to plead the elements of her claims for emotional distress, but argue that all such claims are barred by the exclusivity provisions of California's Workers' Compensation laws.

The California Supreme Court has held that:

> when the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability.

Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 315 (1987). Psychological injuries arising from termination generally are also covered exclusively by the Workers' Compensation act. Shoemaker v. Myers, 52 Cal. 3d 1, 276 Cal. Rptr. 303, 313-14 (1990). The California Supreme Court has specifically held that if the basic conditions of compensation are otherwise satisfied, and the employer's conduct neither contravenes public policy nor exceeds the risks inherent in the employment relationship, an employee's emotional distress injuries are subsumed under the exclusive remedies of workers' compensation. Livitsanos v. Superior Court, 2 Cal. 4th 744, 754, 7 Cal. Rptr. 2d 808, 815 (1992). "[C]ourts in wrongful discharge actions may not declare public policy without a basis in either constitutional or

statutory provisions." Gantt v. Sentry Ins., 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 881 (1992).

Here, the Court has already held that Wasson has stated a claim under the First Amendment of the United States Constitution. Such a claim, if upheld, clearly would constitute a violation of public policy by the employer, and any claim for emotional distress based on that violation of federal constitutional law would not be barred by workers' compensation. Accordingly, at least part of Wasson's claims for emotional distress are not barred by the California workers' compensation laws, and defendants' motion to dismiss those claims on that ground is denied.

Because the state of the pleadings is so unsettled as a result of the Court's rulings today, and because Wasson may wish to voluntarily dismiss the federal action in favor of refiling the action in state court, the Court declines to reach defendants' arguments with respect to state law immunities and privileges at this time. If and when Wasson amends her complaint, defendants may raise these issues in a later motion to dismiss.

G.

Defendants seek to dismiss Wassons' prayer for attorneys' fees to the extent she seeks fees incurred prior to the filing of this action. Defendants argue that such a request is barred by res judicata, because Wasson sought and was denied attorneys' fees in her state court action. The Court declines to rule on this motion at this time. Defendants do not seek to dismiss the entire request for fees, and Wasson does not specifically seek fees for work incurred in the state court

action. If Wasson ultimately prevails in this action, and seeks fees for the period prior to the filing of this action, defendants may raise their res judicata argument again at that time.

III.

Defendants also move to disqualify Wasson's counsel because the attorney who represented Agrella in his divorce is now associated with the law firm that is representing Wasson in this action. For the reasons set forth below, this motion is denied.

The Rules of Professional Conduct of the State Bar of California provide that "[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." Rule of Professional Conduct 3-310(E). The relevant test for disqualification is whether the former representation is substantially related to the current representation. Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980). The relationship is measured by the allegations in the complaint and by the nature of the evidence that would be helpful in establishing those allegations. Id. at 1000. If there is a reasonable probability that confidences were disclosed in the former representation that could be used against the client in later, adverse representation, a substantial relation between the two cases is presumed. Id. at 998.

> The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring

> the very disclosure the rule is intended to protect. The inquiry is for this reason restricted to the scope of the representation engaged in by the attorney. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.

Id. at 999 (citation omitted). Once an attorney is found to be disqualified, both the attorney and the attorney's firm are disqualified from suing the former client, whether or not other members of the firm were actually exposed to the information. Id.

Margaret England ("England") represented both Agrella and his wife in their divorce proceedings in 1995, when she was a sole practitioner. On March 15, 1997, after her work on the divorce had been concluded, England joined the law firm of Lanahan & Reilley. Martin T. Reilley and Teresa J. Norton of Lanahan & Reilley represent Wasson in this action against Agrella and others. England has never worked on Wasson's case against Agrella. She does not have access to those files and has never attended any meetings related to that action.

During the period England was representing Agrella, the first two of the letters that are at issue in this case were distributed. Those letters attack Agrella's competency to be president of Santa Rosa Junior College, and accuse him of racism and adultery, among other accusations. Agrella contends that England may have had discussions with his wife about the veracity of these allegations. England avers, however, under penalty of perjury, that she never discussed with Agrella or his wife anything having to do with the

controversy about the letters, and never discussed whether either party was having an extra-marital affair. The divorce was uncontested, and England served only as a facilitator to memorialize their settlement agreement.

The overlap between the Agrellas' divorce proceedings and Wasson's action in this Court is quite small. The letters that are the core of the instant action accuse Agrella of misconduct in a variety of areas, only one of which (adultery) is likely to be raised by the participants in a divorce proceeding. The truth or falsity of this allegation is not a necessary element of any of Wasson's claims. Even assuming that the letters, in their entireties, contain entirely true allegations and are found to constitute speech that is protected under the First Amendment, defendants' actions in attempting to terminate Wasson still may have been lawful if dissemination of the letters was sufficiently disruptive to the operation of the college. Connick v. Myers, 461 U.S. at 150-51. Thus, the real battleground in this litigation is likely to be over the disruptive effects of the letters, rather than their veracity.

Moreover, England swears under penalty of perjury that she never discussed anything about the letters controversy with the Agrellas. As the divorce proceeding was uncontested, and England was representing both sides in the proceeding, the Court has no reason to question England's declaration.

The Court is satisfied that the two actions are not substantially related, and that England did not obtain confidential information relevant to the current action. Accordingly, defendants' motion to disqualify Wasson's

counsel is denied. Nonetheless, as a safeguard, the Court orders Wasson's counsel to continue to maintain an ethical wall barring England from any participation in this litigation, however minimal; barring her from all access to any documents relating to this litigation; and barring her from discussing the litigation with any personnel at Lanahan and Reilley.

IV.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART, as follows:

a. All claims against the District and Governing Board are DISMISSED as barred by the Eleventh Amendment, without prejudice to refiling in state court.

b. All federal claims against the individual defendants in their official capacities are DISMISSED as barred by the Eleventh Amendment to the extent Wasson seeks an award of damages, without prejudice to refiling in state court.

c. All state law claims against the individual defendants in their official capacities are DISMISSED as barred by the Eleventh Amendment to the extent Wasson seeks injunctive relief, without prejudice to refiling in state court.

d. All claims against Roberts and Mitchell are DISMISSED, with leave to amend.

e. All § 1983 claims based on violations of the California Constitution or state law are DISMISSED WITH PREJUDICE.

f. Defendants' motion to dismiss the § 1983 claim for violation of the First Amendment, based on qualified immunity, is DENIED.

g. Defendants' motion to dismiss the First Amendment claim for lack of standing and mootness is DENIED.

h. Wasson's § 1983 claim for violation of the Fourth Amendment for an allegedly unlawful search of Wasson's personnel files and computer is DISMISSED WITH PREJUDICE.

i. Wasson's § 1983 claim for deprivation of Wasson's property interest in her employment in violation of the procedural due process guaranteed by the Fourteenth Amendment is DISMISSED WITH PREJUDICE.

j. Wasson's § 1983 claim for deprivation of Wasson's liberty interest in her employment in violation of the procedural due process guaranteed by the Fourteenth Amendment is DISMISSED, with leave to amend.

k. Wasson's § 1983 claim for violation of the privacy rights protected by the Fourteenth and Ninth Amendments by disclosing information from her personnel

and computer files to the public is DISMISSED, with leave to amend.

1. Wasson's claims for breach of contract, and tortious breach of the covenant of good faith and fair dealing, against the individual defendants are DISMISSED WITH PREJUDICE.

m. Wasson's claim for common law invasion of privacy is DISMISSED, with leave to amend.

n. Defendants' motion to dismiss Wasson's claims for negligent and intentional infliction of emotional distress as barred by the exclusivity provisions of California Workers' Compensation law is DENIED.

o. Defendants' motion to dismiss Wasson's state law claims as barred by various state law immunities and privileges is DENIED, without prejudice to reasserting these arguments if and when Wasson files an amended complaint.

p. Defendants' motion to dismiss Wasson's prayer for attorney's fees incurred prior to the filing of this lawsuit is DENIED, without prejudice.

2. Defendants' motion to disqualify Wasson's counsel is DENIED.

3. Wasson shall prepare and file an amended complaint on or before December 29, 1997, in accordance with the foregoing rulings.

Dated: December 5, 1997.

/s/_____
William H. Orrick
United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 8, 2000]

No. 98-15967

SYLVIA J. WASSON, an individual, *Plaintiff-Appellant,*	)
v.	)
SONOMA COUNTY JUNIOR COLLEGE; GOVERNING BOARD OF THE SONOMA COUNTY JUNIOR COLLEGE DISTRICT; ROBERT F. AGRELLA; JAMES MITCHELL; JOHN ROBERTS, *Defendants-Appellees.*	)

ORDER

BEFORE: SCHROEDER, B. FLETCHER, and HALL, Circuit Judges.

Judges Schroeder and Hall have voted to deny appellant's petition for rehearing and recommend rejection of the petition for rehearing en banc. Judge Fletcher has voted to grant the petition for rehearing and recommends rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition tor rehearing is denied and the petition for rehearing en banc it rejected.

(2)

Supreme Court, U.S.
FILED
SEP 7 2000
CLERK

No. 00-207

IN THE
SUPREME COURT OF THE UNITED STATES

Sylvia J. Wasson, an Individual,
Petitioner,

v.

Sonoma County Junior College District; Governing Board of the Sonoma County Junior College District; Robert F. Agrella; James Mitchell; John Roberts,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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I.

INTRODUCTION

Despite adverse rulings from different state and federal courts, Petitioner SYLVIA WASSON ("WASSON") continues to pursue this action for damages against the Respondents SONOMA COUNTY JUNIOR COLLEGE, GOVERNING BOARD OF THE SONOMA COUNTY COLLEGE DISTRICT, ROBERT F. AGRELLA, JAMES MITCHELL; JOHN ROBERTS (hereinafter collectively referred to as "THE DISTRICT") arising out of an incident that occurred in 1997, pertaining to the DISTRICT's alleged conduct in investigating the events surrounding the authorship and widespread dissemination of six anonymous documents throughout a public community college's campus community. The documents were distributed to the news media and to the general public through targeted mailings and caused disruption of the orderly administration of the College, ultimately, causing the DISTRICT to issue a Notice of Intent to Dismiss to WASSON on the basis of its belief in her authorship and dissemination of these documents.

Despite misleading statements of facts in her Petition to the contrary, WASSON has strenuously and continuously denied authorship of the letters, including statements of denial under oath. Yet she still seeks to assert the Constitutional protections of the First Amendment free speech clause without satisfying the requirements of standing.

As the United States Circuit Court for the Ninth Circuit and the California Court of Appeal have already correctly concluded based on clear existing legal authority, ***a public employee cannot maintain a claim against her employer based on a violation of her rights to free speech***

when she denies having engaged in the speech in question.

WASSON's Petition fails to present an issue that gives rise to any need for this Court to Review any unsettled question of law.

II.

LEGAL ARGUMENT
WHY REVIEW SHOULD NOT BE GRANTED

A. REVIEW SHOULD BE DENIED BECAUSE THE PETITION FAILS TO GIVE RISE TO A GROUND FOR REVIEW UNDER RULE 10 OF UNITED STATES SUPREME COURT

1. Grounds for Review

Rule 10 of the United States Supreme Court Rules requires parties seeking review by the Supreme Court of the United States to state a compelling reason for review.

WASSON's Petition presents two arguments for granting the writ:

ARGUMENT A.

> "It is Counterintuitive to Require The Protection of Anonymous Speech Rights Be Contingent on the Waiver Of this Right"; and;

ARGUMENT B.

"A Litigant Has Standing to Assert An Anonymous Speech Claim When Her Pleading Shows That She Suffered An "Injury In Fact" Due To A Public Employer's Efforts To Suppress The Protected Speech Of Another Person."

While she does not specifically identify which of the Rule 10 reasons the Court should consider in granting her Petition, it appears she is relying upon Rule 10(C): ". . . . an important question of federal law that has not been, but should be, settled by this Court." However, for the reasons set forth below, existing law as to anonymous speech rights is not in conflict with this case and is not unsettled. Moreover, as discussed below, the Petition relies upon misstatements of fact and the issues presented do not coincide with the issues raised by Petitioner in the lower Courts.

2. **The Law is not "Unsettled"**

Three other United States Circuit Courts have came to the same conclusion as the Ninth Circuit in the instant case based on very similar facts as follows:

(1) *Jones v. Collins* 132 F.3d 1048, 1054 (5th Cir. 1998). The plaintiff in this case, Ethel Jones, an elementary school principal, alleged that her First Amendment rights were violated because she was transferred to a lower position after she was accused of making certain negative comments about an administrative action. However, Ms. Jones (like Dr. WASSON herein), denied having made any comments. The Court thus found that in the absence of any actual expression

by Jones which is subject to First Amendment protection, there can be no constitutional violation.

(2) *Barkoo v. Melby* 901 F.2d 613 (7th Cir. 1990). Plaintiff alleged that she was constructively discharged from her position as a communications operator for the police department based upon her supervisors' erroneous belief that she had discussed a matter relating to the department with local media. The court concluded that the plaintiff could not establish a violation of her First Amendment right to free expression where she insisted she did not make the speech in question.

(3) *Fogarty v. Boles* 121 F.3d 886 (3d Cir. 1997). The Plaintiff in this case, also a school teacher, claimed he was punished based upon the school principal's erroneous belief that he had contacted the press about a matter of public interest at the school. The court held that the teacher failed to meet his burden of proving a violation of his free speech because he denied contacting, attempting to contact, or having any intention of contacting the press.

All three of these cases replicate the same holding applied to the WASSON case by the Ninth Circuit: One who denies speaking has no standing to assert the protections of free speech. (See also *Moran v. Washington* 147 F.3d 839, 846 (9th Cir. 1998).)

Petitioner attempts to draw a distinction by arguing that in the above-referenced cases there was no objectively manifested speech at all whereas in her case, there is speech that has been denied. The distinction does not change the reasoning of the Courts' holdings. "A free speech claim depends on speech. (*Fogarty*, supra, quoting *Pro v. Donatucci* 81 F.3d 1283, 1292 (3d Cir. 1996). Since WASSON denies

having made any speech, taking her at her word, there is no speech to which the Constitutional protection of the First Amendment would apply.

Petitioner also argues that *Watters v. Churchill* 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 was misapplied by the Ninth Circuit. However, she erroneously bases this argument on her contention that:

> "Her claim was not based solely upon being falsely accused of being the anonymous author. Rather, it was asserted to protect the First Amendment anonymous speech rights held by other District employees and herself." (Petition, Pg. 19, Paragraph 3).

However, as indicated above, Petitioner misstates her assertions which have consistently and vehemently stated that she was not the author of the anonymous letters — not that she was denying authorship for other altruistic reasons. Nowhere in her Complaint is there a reference to seeking protection of anonymous speech, either for herself or another party. The Ninth Circuit predicated its finding upon her not being engaged in the speech in question. She now, in the Petition for the first time, seeks to change that predicate and suggest that she (and others) engaged in the speech and had to deny authorship to preserve the right to anonymous speech. The Court should not presume such prior perjury on the part of Petitioner. It should take her at her word (given under oath) and let the natural and logical consequences of that denial lead to the result of no protection, found by every Court which has ever addressed this issue.

B. THE PETITION SETS OUT MATERIAL MISSTATEMENTS

In compliance with United States Supreme Court Rule 15.2, Respondents contend that there are significant misstatements in the Petition that bear on the issues presented for the Court as follows:

1. Contrary to the Contention in her Petition, Petitioner Was Not Required to Waive Anonymous Speech Rights

Argument A of the Petition asserts that:

> "It is Counterintuitive To Require The Protection of Anonymous Speech Rights Be Contingent Upon the Waiver Of This Right."

However, Petitioner WASSON has never been required to waive her right to anonymous speech. From the very beginning of this action and her companion state court action, WASSON has continuously and vehemently denied authorship of the anonymous letters. The District Court complaint never even suggested that WASSON was protecting her or anyone else's anonymous speech rights.[1] Nevertheless, the Petition now argues that WASSON had to deny authoring these documents or stating her association with the actual anonymous author to preserve her anonymous speech rights.

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[1] Paragraph 26. of the First Amended Complaint states: "DR. WASSON is not the author or disseminator of the five anonymous letters and one flyer which were the sole basis for defendant's ROBERTS' recommendation and the DISTRICT's decision to terminate DR. WASSON."

Respondents do not dispute that certain anonymous speech is protected under the United States Constitution. However, when a person is questioned about "anonymous" speech, there are three answers that can be given:

1. Acknowledge making the speech (authorship);

2. Decline to state based on the protection of the First Amendment; or

3. Deny making the speech.

Here, Petitioner WASSON denied making the speech. Although she now contends that she had to do so in order to preserve her rights to anonymous speech, as is indicated above, this is an incorrect assertion. She could have instead declined to respond regarding authorship and sought the protection of the First Amendment for anonymous speech.

In fact, by denying having made the speech in question she is not protecting the anonymous speech of a third party. If the goal of her response was to protect a First Amendment right to anonymous speech for a third person, her response should have been "decline to state." Accordingly, Petitioner's argument for review is premised on an incorrect assertion as well as setting out implications that contradict her prior sworn denials of authorship.

Additionally, Petitioner did not raise this argument in her federal court complaint. Instead, she strenuously and repeatedly argued that she was "falsely accused of authorizing and disseminating anonymous hit pieces." (Complaint, Pg. 9, Paragraph 33). The Ninth Circuit, in the discussion section of the opinion of February 16, 2000 (see APPENDIX A to the Petition, Pg. 5a, *Wasson v. Sonoma County Junior College et*

al. (9th Cir. 2000) 203 F.3d 659) further reflects Petitioner's position in the lower courts:

> "This First Amendment case is unusual because Wasson asserts that the defendants retaliated against her for speech that she insists she did not make. Accepting Wasson's allegations as true, she thus had not engaged in any relevant constitutionally protected speech. Yet, she claims that her free speech rights under the First Amendment were violated because the defendants falsely imputed to her the letters critical of Agrella."

Accordingly, the Petition is factually misleading as to this issue incorrectly making it appear that Petitioner has continuously asserted a right to anonymous speech when in reality she has always ***denied*** authorship.

2. <u>Petitioner was not Terminated</u>.

While the DISTRICT proceeded with the process leading toward eventual dismissal, Petitioner WASSON was placed on paid administrative leave. She remained in such paid status until the Governing Board withdrew its intent to dismiss notice three months later. Petitioner was never terminated from employment. Petitioner never lost a day's pay. Petitioner remains a tenured faculty member of the DISTRICT to this date with no interruption of her paid employment status.

3. <u>Handwriting Analyst was Competent</u>:

Petitioner also takes liberty with other factual issues by stating that the factual issues are undisputed when in fact they

are disputed. Petitioner claims on Page 2, Paragraph 1, that the District hired a handwriting analyst without properly investigating her competency or prior false identifications made by her. This is a disputed statement. The District asserts that the handwriting analysis was competent.

CONCLUSION

Petitioner has failed to raise a compelling reason for this court to exercise its discretion and grant review of her case. As such, Respondents respectfully request that this Court deny review of the Petition for Writ of Certiorari.

Respectfully submitted,

/s/_____
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